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Supreme Court, U.S.
FILED
OCT 19 2009
OFFICE OF THE CLERK

No. 09-494

IN THE

Supreme Court of the United States

JERRY CRAWFORD; CHARLES ANNABEL; DARRYL BALLARD; MATTHEW BURDO; DON HOSKINS, ROY LANNING; PETER POWELL, WANDA SIMPSON, DANIEL SLANE, PETITIONERS

v.

TRW AUTOMOTIVE U.S. LLC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JEANNE MIRER
Counsel of Record

Eisner & Mirer P.C.
118 University Place,
8th Floor
New York, NY 10003
(212) 473-8700

CURRY & TAYLOR • (202) 393 4141

QUESTIONS PRESENTED

I. WHETHER THE PROVISIONS OF §510 OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) APPLIES TO DECISIONS TO CLOSE PLANTS, AND WHETHER THE FAILURE TO RECALL INDIVIDUALS TO WORK PRIOR TO THE PLANT CLOSING WITH THE SPECIFIC INTENT TO PREVENT THEM FROM REACHING AN IMPORTANT THRESHOLD FOR SIGNIFICANT RETIREE BENEFITS, ARE PROHIBITED PRACTICES UNDER §510?

II. WHETHER IN THE FACE OF AN ADMISSION THAT PENSION COSTS WERE A FACTOR IN THE DECISION TO CLOSE ONE OF RESPONDENT'S PLANTS, THE LOWER COURTS ERRED IN ALLOCATING THE BURDENS OF PROOF UNDER THE MCDONNELL DOUGLAS/BURDINE FORMULATION RATHER THAN UNDER A MIXED MOTIVE STANDARD?

III. WHETHER THE LABOR LAW DOCTRINES OF ALTER EGO AND DOUBLE BREASTING APPLY IN THE CONTEXT OF AN ERISA 510 CASE TO PROVIDE EVIDENCE OF SPECIFIC INTENT AS WELL AS A REMEDY TO WORKERS LAID OFF FROM A CLOSED PLANT WHERE THE WORK INITIALLY SLATED FOR THAT PLANT WAS PLACED IN A NEWLY BUILT PLANT A FEW MILES AWAY?

IV. WHETHER THERE ARE EFFECTIVE REMEDIES AVAILABLE UNDER ERISA §510 WHERE VIOLATIONS OF PLANT CLOSINGS ARE FOUND.

V. WHETHER THE ABOVE STATED QUESTIONS IN WHICH EITHER THERE ARE CONFLICTS IN THE CIRCUITS OR WHERE THIS COURT HAS NOT BUT SHOULD SETTLE THESE IMPORTANT QUESTIONS ARE QUESTIONS WHICH MERIT PLENARY REVIEW BY THIS COURT?

VI. WHETHER IN LIGHT OF OVERWHELMING EVIDENCE THAT THE RESPONDENT HAD THE SPECIFIC INTENT TO VIOLATE PETITIONERS' RIGHTS UNDER ERISA 510, THE FAILURE OF THE LOWER COURTS TO FIND A QUESTION OF FACT UPON WHICH TO DENY SUMMARY JUDGMENT DEPARTED SO FAR FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SUCH THAT THIS COURT SHOULD EXERCISE ITS DISCRETION TO EXERCISE ITS SUPERVISORY POWER OVER THESE COURTS?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 560 F.3d 607 (6th Cir. 2009), (Appendix 1a -15a, hereinafter cited as "_a"). The opinion of the District Court granting summary judgment is not reported (23a - 42a). The District Court's Order Denying Reconsideration is not reported (16a-22a). The opinion of the District Court denying plaintiff's motion for relief from judgment under Federal Rule of Civil Procedure 60 (b)(2) is not reported 52a-60). The order denying reconsideration of the motion for relief from judgment under Federal Rules of Civil Procedure 60 (b)(2) is unreported.(45a-51a). The order denying plaintiff's motion for reconsideration in the Court of Appeals is unreported (43a-44a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 2009.A timely petition for rehearing en banc was denied on May 22, 2009. On August 12, 2009, Justice John Paul Stevens extended the time within which to file a petition for a writ of certiorari to October 19, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Employee Retirement Income Security Act (ERISA) 29 USC §1140, also known as ERISA §510, states, in relevant part:

> "... it shall be unlawful for any person to discharge... or discriminate against... a

> participant or beneficiary... for purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."

STATEMENT OF THE CASE

In the second quarter of 2005, Respondent TRW Automotive ("TRW" or the "Company")[1] posted second quarter profits of $85 million, its best performance since becoming an independent parts maker. *The Detroit News, August 18, 2005, Exh 14.* [2]

The very next quarter TRW announced it would close its auto parts plant on Van Dyke Avenue in Sterling Heights, Michigan by August 2006. Petitioners, the named plaintiffs and the class they represent, were hourly unionized members of the United Auto Workers (UAW) who worked at the Van Dyke plant. They all were affected by the closing

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[1]TRW Automotive ("TRW" or the "Company") is a publicly-traded company operating worldwide in 23 countries supplying the world's major vehicle manufacturers with automotive components. The Company reported $13.1 billion in sales in the year 2006. The Company is an affiliate of The Blackstone Group ("Blackstone"), which owns approximately 57% of TRW's outstanding shares of common stock. As a result, Blackstone has the power to control all matters submitted to stockholders and the directors and to exercise control over the Company's decision to enter into any corporate transaction. *See TRW Automotive 2006 Annual Report, pgs. 2, 14, Exh. 19.*

[2]The references in this petition to exhibits are those exhibits attached to the briefing in the District Court. Some of the exhibits have bates numbers which denote that the documents were turned over by TRW in discovery.

decision.[3] The Van Dyke plant had opened in 1956. The collectively bargained for pension and welfare plans provided retirees with a defined benefit pension plan, with payment at retirement age of 62 of a benefit equal to $25.00 per year times years of service, and retiree health benefits. The plan also provided a special benefit for those workers who had at least thirty (30) years of credited who retired from Van Dyke These workers could retire at any age and receive their retiree health care along with a $2,100 a month supplement until it was coordinated with social security.

All of the named plaintiffs had over thirty years of seniority but because of lay offs over the years, they did not have 30 years of credited service. Plaintiffs Jerry Crawford, Don Hoskins, and Larry Powell had service credits in excess of 29 years. **At the time the plant closing was announced these three were on layoff . Each needed to be recalled to work and work only 170 hours before the plant closed in 2006 in order to attain 30 years of credited service.** The Van Dyke plant was strategically located close to Daimler Chrysler's (DCX) Sterling Heights assembly plant. In the fall of 2004 DCX solicited a bid from TRW on a five year contract to provide this plant with various modular pieces which could be delivered on a just in time basis to their plant for assembly into Chrysler cars. One criteria for the plant was that it had

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[3]This plant was part of the TRW's North American Braking and Suspension division which had sales of $2 billion in the year 2006. *Muckley 30-31*. Earnings and profits were so extraordinary in the year 2006 that the board of directors approved more than $36 million in annual compensation for CEO John Plant and three of his top executives. *Crane's Detroit Business , May 28, 2007, Exh 22.*

to be within a short distance from the Sterling Height assembly plant. When TRW put in its initial bid it proposed to put this "modular work" at the Van Dyke plant which was its only plant within the required distance. In early 2005 the contract with DCX contract was secured. The contract was worth $188 million per year. (*Eric Weiss dep p 89).* TRW then decided to change its plans and place this modular work at a smaller plant which it caused to be built (and then leased) on Mancini Drive in Sterling Heights, Michigan. Mancini Drive was also within the required distance from the Sterling Heights Assembly plant and only a few miles from the Van Dyke plant. TRW then decided to close Van Dyke and move the remaining work that was being performed at Van Dyke plant[4] along with other work it had secured[5] but had not started, to other plants, either in Canada or low cost countries.

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[4]In early 2004 the Company outsourced a large part of its Van Dyke plant business allowing the Company to reduce head count to approximately 115 (22 salary, 93 hourly) at the Van Dyke plant. *Sterling Business Review, December 19, 2005, 06863, Exh 21.* One of the rationales for moving other work out was to create space for newer and larger projects which could take advantage of Van Dyke's floor space. According to projections made by TRW management, by 2006, the profitability of the Van Dyke plant would return to about 3.7%, 4% in 2007, and about 5% in 2008. *Exh. 20, 04470.* Thus, Van Dyke has always been profitable and projections made in late 2003 indicated the amount of profit was likely to increase.

[5]When the Company announced the closing of the Van Dyke plant it stated that it "lacked enough work to support the facility". In the communication plan which was written to address the question of whether TRW had been trying to find work to place at the plant, the answer was supposed to be yes, and that over 30 bids had been submitted and only four were accepted after customers demanded lowering of the price. Information provided in response to Plaintiffs' Motion to Compel showed that TRW materially

In the Fall of 2004, TRW developed a corporate plan to aggressively eliminate from its rolls those employees for which the Company was or would be obligated to pay ERISA protected benefits. These ERISA benefit laden employees, commonly referred to as employees with "heritage costs", were targeted for permanent eradication.

In management's discussion with regard to the North American Braking and Suspension Restructuring Program for the years 2004-2005, Company management stated:

> Wage structure within NABS (North American Brake & Suspension) is viewed as uncompetitive versus other tier one companies largely due to **heritage costs** coupled with the single tiered wage structure within both union and non-union facilities. (emphasis added)

N.A. Braking & Suspension Restructuring 2004-2005, September 24, 2004, 05081, pg. 2, Exh 2.

In further articulation of its heritage cost eradication program, the Company stated that its long-term goal was to "reduce heritage costs ... by bringing in new employees with modified compensation

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misrepresented the facts in the communication plan. Defendant provided letters of 44 bids submitted, *(08083-08163)* and a chart showing the date of the bid, who it was submitted to, and who won the bid. A chart showing an analysis of this information. This chart shows that 14 bids, not 4 bids, were accepted, with an estimated value of at least $14,439,399. *Exhibit 25.* No one requested a price change. This information shows almost 40% of the bids were accepted.

packages." *Id. pg. 5, 05084.* To this end, the Company adopted a new-hire health and welfare plan and a new-hire pension plan in April of 2005, which provided for "no retiree medical" and a defined contribution pension plan... *TRW Automotive, New Hire H&W Plan, New Hire Pension Plan, April 15, 2005, 05460-05463, Exh 8.*

When the plant closing was announced many of the workers who had already attained 30 years of credited service retired immediately. Others continued to work but retirements continued. Two high seniority employees were recalled by the plant human resources personnel. Both were in the same situation as Crawford, Hoskins and Powell in terms of needing only 170 hours of work to pass the 30 year threshold to full retiree benefits. They were able to obtain these 170 before the plant closed. In early March of 2006 the Human Resources personnel at the plant were ordered by high management officials not to recall any more workers from lay off. Crawford, Hoskins and Powell had the next highest seniority and would have been called back to work had that order not been issued. Instead of recalling workers the remaining workers worked thousands of hours of overtime. (See, *infra)*

Petitioners filed the instant two count complaint alleging that the decision to close the Van Dyke plant and/or not to place the Van Dyke workers at its new plant on nearby Mancini Drive was made with the specific intent to interfere with their ability to accrue additional service time under the plan allowing some of them to cross the 30 year threshold. The second count was brought on behalf of Crawford, Hoskins and Powell, and alleged that the Company's decision not to stop recalling anyone in March of 2006 before the Van

Dyke plant closed was made with the specific intent to **prevent them from attaining their 30 years of service time.**

Petitioners obtained discovery in addition to **the documents referenced above which articulated the specific intent to eliminate workers with "heritage costs"** proved the TRW's specific intent to violate **510.** This proof included, *inter alia,* (1) an admission by Ronald Muckley, Vice President of the NABS that pension costs was one reason for the decision to close the Van Dyke plant *(Muckley dep pp 152-153)*; (2) documents showing TRW's preoccupation with the savings on pension and health care which would be realized if the Van Dyke plant closed. These documents described to the penny the almost $2 million in savings to the company if the current employees were prevented from accruing any more service credits ("curtailment gain"), and also revised downward the cost to the Company of the immediate retirement of workers who had more than 30 years of service ("curtailment loss"); *TRW Automotive, Project Silver Curtailment Initiative, March 11, 2005 (07741-07760 and 05099)Exhibit 5,* (4) documents from the curtailment team set up to find ways to further lower curtailment losses at Van Dyke, and document s which showed that curtailment losses from the retirements of older workers at Van Dyke were to be offset by curtailment gains from closing two newer unionized plants; *N.A. Braking and Suspension Restructuring 2004/2005 September 24, 2004, 05083, 05080, 05093, Exhibit 2 and Exhibit 5.* (4) documents which disproved TRW's public justification for closing the plant which was that it could not get work (beyond the DCX modular work) for the Van Dyke plant (see footnote 5

and citations therein); (5) documents showing that cutting back on company's obligation for retiree health care was the centerpiece of plant closing negotiations with the Union, and emails from Company President John Plant which opposed negotiating for bridging high seniority workers, like the named plaintiffs to 30 years of service; *(Plant email to Hoover January 16, 2006, 07717, Exhibit 18)*. (6) emails in early March 2006 from high level plant managers telling the Van Dyke Human Resources not to bring anyone back from layoff in the face of 10 retirements slated for April 1[6], and documents which showed the large number of overtime hours worked after no further recalls were allowed (*Emails from Hughes, March 8 2006, 07845, Exhibit 4, and Overtime summary Exhibit 26*); (7) documents showing that the plan for putting the module work at Van Dyke changed after the September 2004 plan to eliminate employees with heritage costs *(September 22, 2004 correspondence from Puuri to Daimler Chrysler, Bates 06427-06428, Exh 1, November 3, 2004;*

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[6]These emails were between Rachelle Mancini (HR at Van Dyke), Bruce Hoover (Director of Operations for Linkage and Suspension), Edmond Hughes (Vice President of HR) and Steven Kiwicz (Vice President of Compensation and Benefits), dated March 7, 2006 and March 8, 2006. On March 7, Ms. Mancini informed the others that ten hourly employees planned to retire on April 1, 2006. The following day Mr. Hoover responded by saying that TRW "must hold off any potential recall of employees," and Mr. Hughes, Director of Human Resources for North American Braking & Suspension, wrote to Steven Kiwicz that "[TRW is] working very hard not to recall any individuals."

correspondence from Puuri to Daimler Chrysler, 06407,06406-06413, Exh 3); (8) documents showing that the Van Dyke plant was always profitable (*Exhibit 20, 04470*), and (9) evidence that the number of people who remained at the plant or with recall rights to the Van Dyke plant equaled the number of people necessary to run the new plant on Mancini Drive.

The Respondent moved for summary judgment arguing *inter alia* (1) that ERISA 510 did not apply in the plant closing context or in the context of recalling laid off workers; (2) assuming *arguendo*, ERISA did apply in these contexts, TRW had a legitimate non interfering reason of plant "overcapacity" for its decision to close, and other business related reasons for not putting the modular work at Van Dyke, (3) and even if those reasons could be shown to be pretext, ERISA did not provide a remedy. Respondent also claimed that the Mancini Drive plant did not provide a remedy because it was not an alter ego to the Van Dyke plant. Respondent specifically claimed that module assembly work which was originally slated for the Van Dyke plant was different from and not compatible with the manufacturing work at Van Dyke.

The District Court agreed with petitioners that ERISA §510 applied to claims for interference with ERISA rights in a plant closing and failure to recall contexts[7]. The District Court also found using the

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[7]In the initial judgment the District Court found that failure to recall from lay off was not a claim recognized under 510; on reconsideration, stated this claim would be cognizable under the the non-discrimination language in 510 but found, ***despite emails to the contrary***, no evidence had been presented that suggested TRW considered an employee's eligibility for ERISA benefits

McDonnell Douglas formulation that plaintiffs had proffered sufficient evidence to establish a prima facie case that TRW intended to interfere with plaintiffs' ERISA protected benefits when it closed the plant. The District Court then credited TRW's reasons for closing the plant and for not placing the DCX module work at the Van Dyke plant as originally planned, and stated that its business judgment may not be questioned as a means of proving pretext. The District Court also described Mr. Muckley's admission that pension cost had been a factor in the decision to close Van Dyke as not the same as showing it was a "motivating" factor. The District Court assumed that the alter ego concept applied in the ERISA context as it did in labor law, but found that the Mancini Drive plant was not an alter ego plant which would have required TRW to continue to employ the plaintiffs and provide them the benefits under their collective agreement and pension plan (34a). The District Court also found, ***despite emails to the contrary***, that no evidence had been presented that suggested TRW considered an employee's eligibility for ERISA benefits when deciding whom to recall (18a). The District Court did not address the issue of remedy in light of its ruling on liability. Rehearing was denied and an appeal was taken from this opinion.

After the appeal was filed, Crawford, et al, discovered new evidence they claimed had been concealed from them and the District Court while the

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when deciding whom to recall (18a). On reconsideration, the District Court also re-framed Mr. Muckley's admission into a finding that pension costs had been a factor in the decision to close the plant into it being a factor in TRW losing business (21a-22a).

motion for summary judgment was pending. This new information was that TRW had expanded and added more work at the Mancini Drive plant and specifically that the new work was not modular work, which exposed, as false, the Company's claim that the module/assembly work was not compatible with other types of auto parts fabrication, a reason given for not placing the module work at Van Dyke.

On March 5, 2008, plaintiffs filed a motion under FRCP Rule 60 (b) (2) seeking relief from judgment, claiming that the District Court's opinion on the alter ego issue would have been impacted if the information had been known. [8] Petitioners sought an order from the District Court to conduct formal discovery into the plans for the expansion when the plans were made, i.e. if they were being made when the Company was arguing to the court that the Mancini Drive plant was only for the modular work. The District Court denied the motion and the request for rehearing. In so doing, the District Court relied only on information obtained by petitioner Matt Burdo from "Dave" and did not consider the second Burdo affidavit in which he stated had been able drive to the back of the plant and because the temperature was warm , he could see into the plant from the open dock doors and saw machines similar to the ones at Van Dyke. These rulings were appealed and consolidated on appeal.

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[8]One of the reasons the District Court found the Mancini Drive plant was not an alter ego of the Van Dyke plant was that Mancini Drive was built in order to accommodate modular assembly work which was different from and incompatible with other types of business (19 a). The new evidence tended to show that new work in the expanded Mancini Drive plant was not modular work.

While the Sixth Circuit agreed that ERISA 510 applies in the plant closing context, and disagreed with the District Court on whether business judgment may be questioned to prove pretext, the panel rejected what it characterized petitioners' claimed right to be recalled or transferred to the Mancini plant (7a). Petitioners did not claim the right to transfer or recall to the Mancini Drive plant, **independent of a finding that Mancini Drive was an alter ego to Van Dyke.** [9] The Sixth Circuit rejected the District Court's finding which assumed the concept of alter ego applied in the ERISA context, when it "declined the invitation" to apply the doctrine of alter ego or "double breasting (a form of alter ego) to ERISA (8a).

The Sixth Circuit agreed that petitioners could question the credibility of stated business judgment to determine whether reducing pension benefits was a motivating factor in or incidental to the decision to shut down a plant "that was close to vesting". It found that there were only a few people close to vesting and that petitioners' evidence was not sufficient to withstand summary judgment.

The Sixth Circuit specifically did not "wade into the murky pond" of the remedy issue because of its findings on liability (15a). The Sixth Circuit upheld the District Court's decision not to give petitioners more discovery into the question of the expansion of the Mancini Drive plant, as a basis for seeking relief from

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[9]The petitioners only recall claim was that TRW failed to recall Crawford, Hoskins and Powell to the Van Dyke plant before it closed so that they could work the necessary 170 hours in order to have 30 years of service credits.

judgment, thus upholding the District Court's denial of petitioner's motion under Federal Rules of Civil Procedure, 60 (b) (2). The Sixth Circuit adopted the view of the District Court that even with the expansion at Mancini Drive, since it was not expanded to the full size of the previous Van Dyke plant it could not have been an alter ego. (14a).

REASONS FOR GRANTING THE WRIT

Despite disagreements between the District Court and the Court of Appeals, this petition presents issues to this Court which merit plenary consideration, since there is either a conflict among the circuits, or involves important issues of federal law which have not been, but should be settled by this Court. Firstly, petitioners seek affirmation that actions by employers either to close plants or to not recall workers for the purpose of interfering with attaining their rights under a retirement plan, are within the purview of ERISA 510 protection. The majority of courts addressing this issue have so held. Second, petitioners seek a finding that both lower courts erroneously failed to allocate the burdens of proof to the parties under the mixed motive analysis, given the admission by Mr. Muckley that pension costs were a factor in the decision to close Van Dyke. The Courts of Appeals are split on the level of proof required to prove a violation of ERISA 510 and, in particular, have not addressed the impact of the 1991 amendments to Title VII and/or this Court's decision in *Desert Palace Inc. v Costa, 539 U.S. 90 (2003)*, in addressing the allocations of the burdens in cases where, as here, there is evidence of mixed motives. Third, petitioners seek a ruling that the alter ego doctrine is appropriate in an ERISA 510 case such as

this. There are many cases which so hold in the context of collections of indebtedness to pension funds but not in the setting as petitioners have raised. Fourth, there is a split in the circuits as to remedies available to those who have proven ERISA 510 claims. Although neither the District Court nor the Sixth Circuit addressed the remedies question, it is very likely that the concern that there was no remedy affected the Courts' opinions on liability. That is, judges are loathe to find the law is violated without being able to provide a remedy. In the face of the Sixth Circuit's reference to the remedies area, as a "murky pond" they did not want to wade into, this is an important question of federal law which has not been but which should be settled by this court.

Further, while it is true that the writ of certiorari is rarely granted when the error is one of erroneous factual findings or misapplication of a properly stated rule of law, where there is overwhelming evidence that an illegal factor motivated the decisions herein, the failure of the lower Courts to find a question of fact upon which to deny summary judgment has so far departed from accepted and usual course of judicial proceedings, it is respectfully submitted that this Court should exercise its discretion to exercise its supervisory power over these Courts.[10]

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[10]While petitioners believe that the Courts should have granted the motion for relief from Judgment under Federal Rules of Civil Procedure 60(b) (2), this petition will not address that issue as it is the underlying claims which are pertinent to this petition.

I. ERISA 510 PROTECTIONS APPLY TO PLANT CLOSING DECISIONS AND TO DECISIONS NOT TO RECALL LAID OFF WORKERS TO WORK

Since this Court's unanimous decision in *Inter-Modal Rail Employees Ass'n v Atchison, Topeka and Santa Fe Ry*, 520 U.S. 515 (1997), this Court has not addressed any ERISA 510 issue. While the issue in *Inter-Modal* was whether section 510 protected claims for interference with non-vesting welfare benefits in addition to attainment of rights which vest, that case involved a group of employees who lost both rights as a result of a decision by the Railroad to source their work to a new company which provided inferior pension and welfare benefits. The Court in *Inter-Modal* assumed a breadth to 510 protections based in the language of the law which goes beyond the right of an individual to assert a claim for interference with a right which may vest. This Court specifically recognized that when an employer acts in ways proscribed by 510 with the purpose of interfering with rights under the plan it violates that law[11]. Cases, both prior to *Inter-Modal*,[12]

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[11]The Court stated: ... "in the case where the employer acts with a purpose that triggers the protection of 510, any tension that might exist between an employer's power to amend the plant and a participant's rights under 510 is the product of a careful balance"... at 516.

[12]See e.g., *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir.), cert. denied, 484 U.S. 949 (1987), later proceeding sub nom *McLendon v. Continental Group, Inc.*, 802 F.Supp. 1216 (D.N.J. 1992), *Pickering v. USX Corp.*, 809 F.Supp. 1501, 1533 n.18 (D. Utah 1992).

and the instant case, after *Inter-Modal* have extrapolated from *Inter-Modal* to find an employers' discretion to modify or terminate a plan, does not permit a company to discharge employees or alter their plan rights "to circumvent the provision of promised benefits." *Id*, at 515. But, notwithstanding this, TRW argued that section 510 should not apply to plant closing decisions. This Court should hold otherwise. It must be remembered that "plant closings were not beyond the experience of ERISA's drafters. In fact, a plant closing may have been the final straw which convinced Congress of the necessity of pension reform. In 1963, Studebaker Corporation closed its automobile plant in South Bend, Indiana. As a result of that closing, thousands of employees lost their jobs. More importantly for future pension regulation, due to the under funding of the Studebaker pension plan, 6,900 employees lost some or all of their promised pension benefits. The widespread deprivation of pension benefits inspired Congress to investigate the general lack of security for private pension plans." See, Muir, "*Plant Closings and ERISA's Non-Interference Provision*", 36 B.C. L. Rev. 201 (1995), pp. 203-204 .

While ERISA does not require companies to set up pension or welfare plans, and gave them the right to modify, terminate or alter them, nevertheless, Section 510 was enacted to counterbalance that flexibility to protect employees against employment actions which intentionally make promised benefits illusory. See, Spanitz. *Inter Modal Rail: Will ERISA's Newly Defined Welfare Benefit Non Interference Clause Curb Outsourcing?*", 23 Del J Corp L 589 (1998), pp 603-604.

Thus, both lower Courts were correct when they found that 510 does apply to plant closings decisions. Both lower Courts were incorrect when they found that because lay offs and recalls are not a prohibited practice specified in 510, the decisions not to recall petitioners Crawford, Hoskins and Powell at a time when they could achieve 30 years of service credits at Van Dyke did not violate 510. To the extent they relied on the non discrimination portion of 510, both courts found no evidence of discrimination because recalls were based on seniority. This finding totally ignored the emails ordering the plant to stop recalling anyone after two people who had been recalled and qualified for the 30 year benefits. Petitioners assert that a lay off without recall in the plant closing context, when it was known a recall would have allowed for a vesting or even to accrue a larger benefit, is a prohibited practice under 510. It is, in fact, tantamount to a discharge for the purpose of interfering with the employee's rights to attain a benefit under the plan. The courts in *Gavalik* and *Pickering* under similar circumstances found lay offs which became permanent and interfered with the plaintiffs' ability to obtain and increase in benefit value to violate 510.

II. EVIDENCE AND ALLOCATIONS OF BURDEN'S OF PROOF TO WITHSTAND SUMMARY JUDGMENT IN A 510 CASE REQUIRE A MIXED MOTIVE ANALYSIS.

Because 510 describes the actions being taken "for the purpose of" interfering with attaining a benefit under the plan, it is a state of mind statute and evidence must be presented, either direct or

circumstantial of that intent. The fundamental distinction between employer actions which have been found to violate 510 is one of "which came first". Stated another way, was the decision to terminate an employee made first with the impact on benefits being an indirect effect, or was there a decision to first analyze the cost of the employee's benefits and then to make employment decisions consistent with eliminating employees whose jobs include those costs? See, *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993). *Daughtrey* stands for the principle that "measures designed to reduce costs in general that also result in an incidental reduction in benefit expenses do not suggest discriminatory intent. To succeed on a 510 claim the employee must produce evidence suggesting that the employer's decision was directed at ERISA rights in particular." Plaintiffs are not required to prove that the only reason for the decision is a specific intent to interfere. Rather, **at least one factor** which motivates the decision must be aimed at ERISA rights. *Nemeth v Clark Equipment Co.*, 677 F.Supp 899 (W.D. Mich 1987)

Consistent with *Daughtrey, supra,* petitioners submitted significant evidence that the loss of benefits was not incidental to their job loss, but rather central to it. The Company first stated as policy its plan to eliminate employees who had rich benefit packages (i.e., heritage costs), had analyzed how to eliminate the costs associated with these employees, and then made out-sourcing and plant closing decisions consistent with this policy.

510 cases have been analogized to Title VII cases in employment. As a result, Courts have reflexively

applied the burden shifting and proof allocations set forth in *McDonnell Douglas v Green*, 411 U.S. 792 (1973) and *Department of Community Affairs v Burdine* 450 U.S. 248 (1981). This is because direct evidence of intent is rarely available. The lower courts herein analyzed the facts according to this framework. They started, though, by accepting, without question, TRW's claim that in 2004 it faced significant overcapacity within its North American Braking and suspension group and assumed that overcapacity translated into lost profits.[13] Both courts ignored TRW's own annual report and other public documents which showed TRW having record profits.

Even accepting there may have been overcapacity in the North America Braking and Suspension group due to off shoring work to low cost countries or other out-sourcing decisions by TRW itself to create that overcapacity in North America, the manner in which the Company addressed that overcapacity is what has 510 implications. There is nothing, except the intent to rid itself of employees with the richest benefit packages, which requires overcapacity to be addressed by targeting employees such as petitioners who possess the best benefits.[14] Similarly, after finding that petitioners had brought forth sufficient evidence to prove a prima facie case,

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[13]TRW presented nothing of substance to support these assertions.

[14]Beginning in 2005, the North American Braking Divsion closed five (5) union plants and transferred the work to non-union plants where heritage costs could be reduced or eliminated. *Summary of Closures, Exh 16.* Management developed an "anti-union campaign" designed to eliminate the higher labor costs associated with unionized activities. *Hoover email, March 23, 2005, 06830, Exh 7; Hoover email, April 22, 2005, Bates 06914, Exh 9.*

both lower Courts accepted without any question that the Van Dyke plant had to close due to overcapacity. The District Court also accepted without question TRW's reasons for not curing the overcapacity by placing the DCX module contract[15] at Van Dyke, and forbade petitioners from attacking the credibility of TRW's business judgment for not placing the DCX work at Van Dyke as a way of proving pretext. The Court of Appeals did not directly address TRW's reasons for not placing the DCX module contract at Van Dyke or accept that it was possible to cure the overcapacity issue by placing this huge contract there.[16] Although the Court of Appeals did disagree with the District Court about whether business judgment may be questioned to prove pretext, the Court of Appeals, like the District Court, was overly swayed by the fact that by 2004 TRW had so emptied out Van Dyke that it could see some logic in closing the plant. The Court of Appeals wrongly assumed, however, that to prevail petitioners had to show that more than a few people were on the verge of reaching the eligibility for the benefits associated with 30 years

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[15]Vice President of Human Resources admitted that if the DCX contract had been placed there the overcapacity issue would have been solved. (*Hughes dep pp 108*) While TRW claims there still would have been more space in Van Dyke the question is not space but fixed costs associated with the building. The fixed costs before the decision was made were 26% when the Company wanted to get it to the 10% to 15% range. (*Sterling Business Review, September 19, 2005, 06857, Exhibit 21*). Placing the DCX contract there would have cured the problem.

[16]The Court of Appeals claimed petitioners stated that the overcapacity at Van Dyke was a false reason because the plant was so poorly run and that the company could have kept it going if it had cut costs and put the DCX contract there. This was not petitioner's position.

of service credits, and assumed those were the only costs TRW had analyzed, when in fact TRW predicted almost $2 million in savings from stopping the rest of the employees at Van Dyke from earning more service credits. Section 510 applies to **all** the employees (all of whom in this case were minimally vested with over five years of service credits) who lost the right to continue to accrue additional years of service so as to receive a higher pension[17]. Therefore, it was error for the Court of Appeals to even consider as probative evidence that the majority of the class was not close to achieving the benefits of those who passed the 30-year threshold.

The most important error was that lower Courts evaluated the evidence and allocated the burdens of proof through the *McDonnell Douglas/Burdine* prism. Mr. Ron Muckley, the Company's vice president of this division, **admitted that pension costs were a factor among others in the decision to close the Van Dyke plant.** Where a company concedes an illegal factor played a part in the decision, burdens of proof are to be analyzed according to cases presenting mixed motives.

The mixed motive burdens of proof were initially articulated in *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989) where the defendant admitted that plaintiff was not made a partner in the accounting firm based on sex role stereotypes. The defendant claimed the same

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[17]See e.g. *Conkwright v Westinghouse Elec. Corp.* 933 F.3d 231 (4th Cir 1991), *Dister v Continental Group Inc.*, 859 F.2d 1108 (2d Cir. 1988), *Clark v Risistoflex Co, a Div. of Unidynamics Corp*, 854 F.2d 762 (5th Cir. 1988) and *Kross v Western Elec. Co.*, 701 F.2d 1238 (7th Cir 1983), for the proposition that 510 extends to claims by vested employees for intentional interference with their **ability to accrue additional benefits.**

result would have occurred even in the absence of these stereotyped attitudes. The Court allowed the company to attempt to prove its claim so as to avoid liability but the burden of proof was on the defendant.

In 1991, Title VII was amended so as to prevent an employer that has used an illegal reason in making an employment decision to avoid liability completely if it is able to demonstrate the same result would have occurred absent the illegal factor. In *Desert Palace v Costa supra*, this Court unanimously held that proof that an illegal factor played a part in the challenged decision did not have to be proven through direct evidence.

In this case, the Vice President admitted that pension costs were a factor among many in the Company's decision to close the Van Dyke plant. Once this admission was made (along with the other significant circumstantial and direct evidence consistent with this admission, and indeed make it appear it was the major factor), the lower Courts should have evaluated this case in the mixed motive framework, and required the Company to prove that the same results would have occurred absent the illegal factor. That is, the Company would have had to prove its stated reasons for not putting an almost billion dollar contract into Van Dyke was based only on legitimate reasons and not the desire to gain $2 million in savings from stopping the petitioners from earning more service credits and, in particular, not allowing petitioners Crawford, Hoskins and Powell[18] to attain 30 years of service credits.[19]

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[18]These three petitioners, the named plaintiffs and the class they

While petitioners may not be able to take advantage of the amendment to Title VII, as 510 was not similarly amended, this Court should settle the question of the proper allocation of burdens of proof in an ERISA 510 mixed motive case such as this and find that the lower Courts erred in this case by keeping the burden with the petitioners at all times, when it should have required TRW to prove its reasons for the challenged decisions were not based on the illegal reasons. [20] This error is so major as to which requires this Court's correction.

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represent have had to endure the hardship of no jobs, no health insurance, loss of property and loved ones as a result of the actions complained of herein. The only thing the named plaintiffs have done is devote more than thirty years of their working lives to this company only to be made expendable because they had earned the right to benefits through collective bargaining. In addition to the errors of law supporting granting of the writ, this Court should address the grave injustice that these workers should be left without a remedy when they have done nothing except live up to their side of the bargain only to lose the benefit of their bargain because management was not satisfied with record profits.

[19]TRW's managers offered differing explanations for the order not to recall anyone. Hoover asserted that the company was "managing [its] headcount." *Hoover, 94*. Hughes said the decision to keep employees laid off was made because the Company wanted "to build with the people [it had]." *Hughes,157*. He also questioned why a company would wish to "drag people back into an organization?" *Id.* These explanations are so general that they do not even state a legitimate non-interfering reason for not recalling these workers. Although the company should have been required to prove that not recalling them made more economic sense than paying the thousands of hours of overtime to the remaining workers, even under a *McDonnell Douglas/Burdine* standard the Company's stated reason for not recalling them, (i.e permanently laying them off) would not have even met the Company's burden of production.

[20]The Third Circuit in *Gavalik*, *supra*, and the District Court in *Nemeth*, *supra*, placed the burden on the companies to show that

III. ALTER EGO AND ERISA 510

An alter ego is an entity established to evade the original entity's responsibilities. *NLRB v. Watt* 273 NLRB 655 (1984). A new entity that is found to be the alter ego of the entity it replaced will be held to all of the prior entity's agreements and obligations. *NLRB v. Fullerton Transfer and Storage Limited, Inc.* 910 F2d 331 (6th Cir 1990). Although the alter ego doctrine was originally developed in the labor law context, it has been applied to cases involving employee benefits brought under ERISA. See *Laborer's Pension Trust Fund v. Sidney Weinberger Homes, Inc*, 872 F.2d 702 (6th Cir. 1988) (applying alter ego principles in ERISA case), and *Ensley v Ford Motor Company*, 2007 WL 2029638 (E.D. Mich. 2007). When an employing entity is found to be "a mere technical change in the structure or identity of the employing entity...(i.e. its alter ego) without any substantial change in its ownership or management" the Courts will disregard the form and find that the two entities are one and the same for purposes of imposing liability. *Howard Johnson Co Inc v. Detroit Local Joint Executive Bd Hotel and Restaurant Emp and Bartenders Intern Union, AFL-CIO*, 417 U.S. 249, 261, n5 (1974).

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the same decision would have been made in the absence of the illegal factor. In *Gavalik* the company was not successful, but in *Nemeth* the defendant was successful. But, see, *Pickering, supra*, where the company had developed a study entitled "Employee Benefits Costs Potential Shutdown of Geneva Plant", where the Court found a violation of ERISA 510 and did not allow the company try to prove it would have come to the same result absent the results of the study.

Petitioners claimed that the Mancini Drive plant was an alter ego of the Van Dyke plant as it was built for the purpose of evading TRW's obligations to the workers at Van Dyke who had been slated to get the DCX contract as it was originally bid to be placed in the Van Dyke plant . Petitioners claimed Mancini Drive had all the earmarks of an alter ego as it involved the same company, the same type of product, the same customers and many of the same management people. Petitioners' argument that Mancini Drive is an alter ego of Van Dyke was proffered as further evidence of intent to interfere, as the employees at Mancini Drive had lower pay and limited benefits. Petitioners also asserted that the existence of the Mancini Drive plant would have provided them with a reinstatement remedy. (See *infra*).

The lower Courts had different views of the alter ego issue. The District Court understood that the concept of alter ego could be applied in the ERISA context, but accepted TRWs claim of major difference between the manufacture of auto parts[21] and the assembly of auto parts, as well as the claim that there was no continuation of work from Van Dyke at Mancini Drive and that the salaried staff was not totally the same. The District Court also claimed that because a

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[21]The District Court ignored plaintiffs' evidence that all of them had done assembly work at Van Dyke and that many of the parts they produced involved both manufacture and assembly. See e.g., Van Dyke plant also conducted "just in time" assembly. *Burdo, 64.* Van Dyke employees performed modular work for five years. *Hoskin, 21-22.* Numerous class members testified that they performed assembly work at Van Dyke. *Crawford, 6, 10, 11, Annabel 10-11, 27-28.*

subsidiary of TRW, (Kelsey Hayes) operated Mancini Drive, there was no disguised continuance.[22]

The Court of Appeals, on the other hand, refused to import into ERISA law, the concepts of alter ego and double breasting from labor law. In addition to these errors, the Court of Appeals assumed an equivalence between successors and alter egos. Successors are very different from alter egos. The owner of a successor must recognize the union if there is one. It is well know that an alter ego is bound by the obligations, including the collective bargaining agreement and benefits of it's "other self".

The Court of Appeals also erroneously found it irrelevant if the Mancini Drive plant was an alter ego because "they would not be entitled to transfer, because the plan granted them no such right, and neither would they be entitled to recall so long as the original discharge was lawful"(8a) If the Court of Appeals had found Mancini Drive to be an alter ego of Van Dyke, the Court would have had to find Mancini was set up to evade TRW's obligations to the workers at Van Dyke (i.e. liability), so that Mancini Drive would have been just a smaller Van Dyke, and the Van Dyke workers would, as a matter of law, have had the right

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[22]Typically, alter egos are called disguised continuances of a prior businesses. Often evasion of liabilities will require the original owner to start another business with a different name, etc. It is in these instances where the Courts will have to assess whether they are in fact the same company. In the case of the same company having different divisions, where one is used to avoid the liabilities of another, the alter ego takes the form of "double breasting". See *NLRB v Fullerton Transfer & Storage supra.*

to work there and be covered by their contract and pension plan.

The Court of Appeals' decision is so riddled with errors that it should not be allowed to stand. Unfortunately, as the case has been published it can be cited as precedent.

IV REMEDIES FOR ERISA 510 CASES

In their law review article entitled, "Failure of Equity: Discriminatory Plant Closings as an Irremediable Injury Under ERISA"[23], Lorraine Schmall and Nathan Ihnes take issue with the development of the law of remedies under ERISA as it applies to plant closings. They highlight the case of *Millsap v McDonnell Douglas Corp*, 368 F.3d 1246 (10th Cir. 2004), wherein the plaintiffs proved the company closed their plant for reasons related to their pension costs,[24] but where the Court determined (after

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[23]55 Cath.U. L. Rev 81 (2005)

[24]In *Millsap v. McDonnell Douglas, supra,* the District Court found a violation of §510 when the company closed its Tulsa, Oklahoma plant. This case is remarkably similar to petitioners' case in that the plaintiffs presented evidence of company memos from outside actuaries that analyzed the savings available if benefits were reduced. One memo consider[ed] various "what if" scenarios, analyzing the effect on costs and savings if the company decided to reduce heads. The financial experts examined "pension cost, savings cost, savings plan cost, healthcare cost, and just direct overhead cost". They also, as petitioners had, memos specifically discussing the curtailment gains from eliminating employees before they vested for higher cost benefits. Despite these documents (like here), McDonnell Douglas argued unsuccessfully that **pension considerations played no part in its decision to close**. That is, they argued that **the sole reason for closing was excess capacity based on economic and**

a settlement had been reached on the lost pension benefits) that the plaintiffs were not entitled to any front or back pay as a result of the illegal decision. Analyzed in the article are the cases cited by respondent herein, to wit: *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993)[25] and *Great-West Life & Annuity Ins. Co. v. Knudson*, [26]534 U.S. 204, 210 (2002), among others.

Their conclusion, similar to this Court's balancing of rights in *Inter Modal*, is that 510 should create some remedies that are part of doing business, and that ERISA 510 falls within the category of laws which regulate illegal entrepreneurial decision making." *Id.* at 139.

In this case, the Court of Appeals mentioned the unpublished case of *Alexander v. Bosch Automotive Systems, Inc.*, No. 05-6010 (6th Cir. May 14, 2007), wherein the plaintiffs alleged that the defendant

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financial considerations. The Court didn't buy it and so, too, this Court should not.

[25]*Mertens* found that relief under ERISA is limited to equitable relief and that "the term 'equitable relief' can assuredly mean ... whatever relief a court of equity is empowered to provide in the particular case at issue".

[26]In *Knudson*, Great-West paid medical bills on behalf of the insured defendant, who later recovered tort damages from a third party for her injuries but in a special needs trust. Great West sued the insured under a reimbursement provision of the insurance plan to collect the funds it had paid. Because the funds were not in the defendant's possession, Great West's claim was akin to an imposition of personal liability for the benefits conferred upon the defendant insured. Such relief was deemed not within the scope of equitable remedies under ERISA § 502(a)(3).

purposely *timed* their lay offs to prevent them from obtaining benefits under a negotiated plant closing agreement, and the Sixth Circuit ruled against them on the ground the value of the agreement was not an equitable remedy.

On the other hand, the Sixth Circuit has held that under *Mertens* restitution is a remedy typically available in equity, and therefore falls within §502(a)(3)'s category of "appropriate equitable relief." *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir. 1995). In *Schwartz, supra*, the plaintiff's claim was based on her retaliatory discharge by the defendant in violation of ERISA § 510. The plaintiff sought back pay and front pay as equitable relief under §502(a)(3). Relying on *Mertens* and its progeny, the Sixth Circuit held that back pay is an equitable remedy of restitution available under § 502(a)(3), as is front pay, because it is a traditional equitable remedy available in cases where reinstatement is not appropriate or feasible. *Schwartz*, 45 F.3d at 1023.

In this case, with the existence of the alter ego plant at Mancini Drive, the issue of reinstatement is not present. Nonetheless, the 10th and 6th Circuits have conflicting views regarding remedies in these cases. As noted above, Courts are loathe to find liability when no remedies are available. Similarly, it is difficult for an attorney to counsel clients to bring a case of this type where there is no adequate remedy. The result is illegal conduct is allowed to go either not found or unpunished. This is not a result this Court should countenance.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

EISNER & MIRER, P.C.
113 University Place, 8th Flr.
New York, New York10003
JEANNE E. MIRER
(Counsel of Record)
(212) 473-8700

(any footnotes trail end of each document)

Nos. 08-1132/08-1777

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERRY CRAWFORD, et al.,
Plaintiffs-Appellants,

v.

TRW AUTOMOTIVE U.S. LLC, Defendant-Appellee.

January 20, 2009, Argued

March 31, 2009, Decided

March 31, 2009, Filed

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 06-14276--Patrick J. Duggan, District Judge.

COUNSEL: ARGUED: Jeanne E. Mirer, EISNER & MIRER, New York, New York, for Appellants.

Robert M. Vercruysse, VERCRUYSSE, MURRAY & CALZONE, Bingham Farms, Michigan, for Appellee.

ON BRIEF: Jeanne E. Mirer, EISNER & MIRER, New York, New York, for Appellants.

Robert M. Vercruysse, William E. Altman, VERCRUYSSE, MURRAY & CALZONE, Bingham

Farms, Michigan, Brian A. Paton, TRW AUTOMOTIVE, Livonia, Michigan, for Appellee.

Before: MARTIN and COOK, Circuit Judges; WATSON, District Judge. *

OPINION

BOYCE F. MARTIN, JR., Circuit Judge.

Plaintiffs, a class of former TRW Automotive employees, allege that TRW violated the Employee Retirement and Income Security Act by closing the plant where they worked to interfere with the vesting of their retirement benefits. The district court disagreed, and granted the company's motion for summary judgment. We affirm.

I.

TRW, an indirect subsidiary of TRW Automotive Holdings Corporation, owned and operated the Van Dyke plant where plaintiffs worked. Van Dyke, a 370,000 square foot facility, was part of TRW's North American Braking and Suspension Group: workers there manufactured front suspension components for various car makers. Its employees, represented by the United Auto Workers, were covered by a collective bargaining agreement between TRW and the UAW, and a defined pension plan. Under the pension plan, employees who retired with thirty or more years of "benefit service" were entitled to retirement benefits; they earned benefit service for each year that they worked over 1680 hours, though if laid-off they only needed 170 hours to get a year's credit. Employees who

retired with 10 years of service and were 55 or older were entitled to an early benefit.

TRW claims that, as of 2004, it faced overcapacity problems which hampered profits. In response, it organized a group to research the costs and benefits of shutting down some of its North American plants. That group identified the Van Dyke plant as a prime candidate for closure. But, before making that leap, TRW considered a few alternatives. Most significantly, it considered placing at Van Dyke work for DaimlerChrysler, though this was only assembly work and not the manufacturing kind typical of Van Dyke. Ultimately, however, the company decided that Van Dyke was in fact not the right place, and the DaimlerChrysler work wound up (the record is unclear precisely how) at a plant located on Mancini Drive owned by the Kelsey-Hayes Company, a separate subsidiary of TRW Holdings. (The Mancini plant employees are not represented by a union and they do not have a defined-benefit pension plan.) So Van Dyke's days became numbered.

Shortly before TRW shut Van Dyke down, however, the company discussed with the UAW the possibility of preferentially hiring laid-off Van Dyke employees to the Mancini plant and "bridging" the benefits of Van Dyke employees who were close to vesting. TRW also offered a severance to employees who opted out of their available retiree benefits. But the two sides failed to reach an agreement and TRW closed Van Dyke in January 2007. At that time, three employees missed the 30-year retirement mark by less than one year of benefit service (all three had been laid-off in 2005), and four others missed the 30-year mark by less than two

years.

Plaintiffs, a certified class of former Van Dyke employees, sued, alleging that TRW violated ERISA § 510 by (1) failing to recall employees following a layoff, (2) refusing to transfer employees to the Mancini Drive facility, and (3) improperly discharging employees to interfere with their attainment of retirement eligibility. The district court granted summary judgment to TRW on all counts, and also later dismissed plaintiffs' motion for relief from the judgment on the basis of new evidence. Plaintiffs appeal.

II.

Summary judgment is only appropriate when there is no genuine issue of material fact, and, in giving the claim fresh review, this Court must draw "all justifiable inferences" in the non-moving party's favor. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

A.

Plaintiffs contend that the district court improperly granted TRW summary judgment because the company violated ERISA when it laid them off in connection with closing the Van Dyke plant. ERISA § 510 makes it "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit plan]." 29 U.S.C. § 1140. This section

was designed to prevent "employers from discharging or harassing" employees to preclude "them from obtaining vested pension rights." *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980). Of course, not only is this illegal, it is also bad business: because providing benefits is discretionary (and so part of total employee-compensation), firing older employees to reduce pension costs both creates animosity between employer and employee and makes employees' compensation less certain, and thus employees will demand higher wages to offset this heightened risk of being fired inopportunely; as a result, employers will have to pay employees higher wages to attract and keep them. *See* Maria O'Brien Hylton, *Insecure Retirement Income, Wrongful Plan Administration and Other Employee Benefits Woes--Evaluating ERISA at Age Thirty*, 53 BUFF. L. REV. 1193, 1204-11 (2005). But some employers are foolish, and thus Congress enacted § 510 to provide a remedy. Plaintiffs assert that TRW "discharge[d]" them to "interfer[e]" with their attainment of full retirement benefits in violation of § 510.

So the primary question here is whether the plaintiffs proffered enough evidence of this improper motive to get to a jury. But first we must dismiss two errant contentions: TRW asserts that ERISA interference claims in the plant sale or closing context are never actionable and plaintiffs assert that TRW violated § 510 by failing to recall or transfer them following their discharge. Neither is correct.

1.

TRW overreaches in stating that employees may never

challenge discharges that result from a plant-closing decision. While "[e]mployers or other plan sponsors are generally free under ERISA . . . to adopt, modify or terminate" pension benefit plans, *Coomer v. Bethesda Hosp. Inc.*, 370 F.3d 499, 508 (6th Cir. 2004), this discretion does not permit them to discharge employees or alter their plan rights to "circumvent the provision of promised benefits." *Inter-Modal Rail Emples. Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515, 117 S. Ct. 1513, 137 L. Ed. 2d 763 (1997) (internal quotations omitted).

Of course, the D.C. Circuit has pointed out that Congress's use of the term "discharge" in § 510 comes in the context of other individually focused terms like "fine, suspend, expel, [and] discipline." *Andes v. Ford Motor Co.*, 315 U.S. App. D.C. 120, 70 F.3d 1332, 1337 (D.C. Cir. 1995). TRW latches onto this to say that broad or class-based claims are never actionable. But, as the D.C. Circuit--and other courts--have routinely recognized, the term "discharge," by definition, is not so limited and thus covers employees fired or laid-off, either individually or as a group, and thus the statutory language gives *any* "discharged" employee a right to sue, whether via class-action or individually. *See, e.g., Gavalik v. Cont'l Can Co.*, 812 F.2d 834, 838 (3d Cir. 1987). Indeed, the *Andes* court explicitly pointed out the possibility that some employer might unscrupulously sell or close a plant to shake off employees on the cusp of establishing benefit eligibility. 70 F.3d at 1338.

2.

Plaintiffs similarly overreach in claiming that TRW was

legally required to recall many of them back to or to transfer them to the Mancini plant. As stated above, § 510 includes a list of prohibited actions, including improperly "discharg[ing], fin[ing], expel[ling]," and "discriminat[ing]." But nowhere is "transferring" or "recalling" listed. Neither have plaintiffs identified caselaw giving effect to such a claim. This is not surprising: the *sine qua non* of a § 510 claim is the presence of some adverse action done to interfere with an employee's rights, and had plaintiffs not been laid-off, whether or not there was a transfer would have been irrelevant because plaintiffs would still have been accruing benefits; similarly, recall would have been irrelevant if there was no discharge or it was lawful, because employees would have no more right to be hired than someone who had never worked for TRW. In other words, the whole game is whether TRW unlawfully *discharged* plaintiffs.

Also, TRW's decision to recall some employees and not others was not discriminatory because those decisions were seniority based, and at least two employees accrued enough pension credits to retire with benefits *after* being recalled. Finally, the employees' collective bargaining agreement provided that benefits accrued only at the Van Dyke plant, so plaintiffs also lacked plan rights to be recalled. *See McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 670 (7th Cir. 1993).

A final detour before the main event: plaintiffs, in support of their theory that § 510 gives them a right to be recalled or transferred, try to import two doctrines into ERISA law: the corporate "alter-ego" doctrine, *see Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 587 (6th Cir. 2006), and the labor law "double-breasting"

doctrine, *see NLRB v. Fullerton Transfer & Storage, Ltd., Inc.*, 910 F.2d 331, 336 n.7 (6th Cir. 1990). The idea seems to be that the plaintiffs view the Mancini plant as the successor or "alter-ego" of the defunct Van Dyke plant. But, setting aside the nuanced analysis required to explain if and how these doctrines would apply to two plants both owned by the same company--rather than to a successor entity--it is unclear what satisfying these tests would get plaintiffs. Suppose the Mancini plant was the "alter ego" of Van Dyke: plaintiffs would still not be entitled to a transfer, because their plan granted them no such right and neither would they be entitled to a separate recall, so long as the original discharge was lawful. So, we decline the invitation to apply these two doctrines to ERISA law because any conclusion would be irrelevant to our decision today. Thus, § 510 does not include the right to be recalled or transferred if the discharge itself was lawful. We now turn to that question.

B.

To defeat summary judgment, the plaintiffs must show that TRW fired them for the purpose of interfering with the attainment of their retirement benefits. 29 U.S.C. § 1140. Plaintiffs may make this showing either through direct or circumstantial evidence, with the latter via the ubiquitous burden-shifting framework that has, like some B-movie villain, devoured nearly every area of law with which it has come into contact. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Plaintiffs here rely on circumstantial evidence. In the ERISA context, the

burden-shifting framework first requires the plaintiffs to establish their "prima facie" case "by showing the existence of (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." *Smith v. Ameritech*, 129 F.3d 857, 865 (6th Cir. 1997). Although some of the cases discuss, in reference to this "prima facie" case, the need for the plaintiff to prove the existence of the employer's "specific intent," *see, e.g., Schweitzer v. Teamsters Local 100*, 413 F.3d 533, 537 (6th Cir. 2005); *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992), that requirement is superfluous and not relevant (at this first stage at least) because it gets to the ultimate question of whether the employer purposefully interfered with the employee's pension rights. This confusion stems in part because the term "prima facie" as used here, does not comport with the traditional understanding of that term--namely, that plaintiffs have proven enough to get to a jury, *see* 9 WIGMORE ON EVIDENCE § 2494, 378-79 nn. 1,3 (1981).

Instead, "prima facie" is *Burdine/McDonnell-Douglas patois* for the fact that the plaintiffs have shown enough to create a rebuttable presumption such that the employer must then produce evidence supporting a legitimate, non-discriminatory reason for the discharge. *Humphreys*, 966 F.2d at 1043; *see also Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1113-14 (6th Cir. 2001) ("A plaintiff's burden in establishing a prima facie case is not intended to be an onerous one."). If the employer makes this showing, the burden shifts back to the plaintiff to show that this proffered reason was a "pretext"--i.e. a phony reason--and instead that

the intent to interfere with the plaintiff's ERISA rights was a "motivating factor." *Id.*

The plaintiffs easily satisfy the low-threshold for establishing their prima facie case. TRW's Vice President of Operations for the Suspension Group stated that pension costs--colloquially known within the company as "legacy" or "heritage" costs--were among the reasons to close down the plant. And that is no surprise: labor costs are often among the largest costs for a plant, and such "legacy" or retirement and benefits costs typically make up the largest portion of labor costs. *See* Hylton, 53 BUFF. L. REV. at 1204-11. Indeed, as the district court observed, the work done at Van Dyke was transferred to a non-union facility where such costs "were reduced or non-existent." This is enough to erect the presumption and require TRW to make an evidentiary showing.

TRW thus replies that it closed Van Dyke because of its overcapacity: only 30,000 square feet of its available 300,000 square feet was being used, so roughly 26% of every sales dollar went to fixed costs and overhead. This is a strong non-discriminatory reason, especially when coupled with the fact that there are necessarily a variety of concerns at play whenever a company decides to shut down a plant.

So we reach the "pretext" stage. Plaintiffs retort that TRW's proffered reason is phony because the plant was so poorly run; specifically, that the company could have kept Van Dyke going if it had cut a variety of possible costs and placed the DaimlerChrysler work there. Thus, plaintiffs argue, because they did not do those things, it must have been the company's desire to

interfere with their pension benefits that motivated it to close their plant. TRW, predictably, retorts that, since its stated reason concerned "business judgment," then its reason is unassailable. In support, TRW quotes dicta from the cases, like: "Measures designed to reduce costs in general that also result in an incidental reduction in benefit expenses do not suggest discriminatory intent." *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993)

But of course: the whole issue is whether reducing pension benefits by shutting down a plant with employees close to vesting was a "motivating factor" or was instead "incidental" because there were other, neutral, business reasons at play. *See Smith*, 129 F.3d at 865. "Business judgment" is not an aegis that deflects all ERISA interference liability; Congress, in enacting § 510, made clear its view that an employer may only discharge employees when neutral, non-pension right-interfering concerns animate the decision.

And, while plaintiffs may not second-guess every business decisions, the reasons supporting any decision to discharge an employee, either individually or in connection with a plant closing, may be considered "to the extent that such an inquiry sheds light on whether the employer's proper reason for the employment action was its actual motivation." *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 576 (6th Cir. 2003) (en banc). In other words, business judgments are relevant insofar as plaintiffs can show that they are incredible or phony, which, while difficult, is not categorically barred, as TRW seems to think.

To support their claim that TRW's overcapacity justification was pretext, plaintiffs point to a variety of documents indicating TRW's desire to reduce pension costs and that reducing these costs played a definite role in TRW's decision to shut down Van Dyke. And, of course, TRW has not denied this. Nevertheless, plaintiffs cannot satisfy their burden of persuasion. At the pretext stage, judges must still bring their judgment to bear on whether or not plaintiffs have met their burden--in effect, the *Burdine/McDonnell-Douglas* framework has fallen away and the question reduces to whether plaintiffs can prove improper motivation. And, despite plaintiffs' evidence, we cannot say that TRW's reason was a mere pretext.

When the plant was shut down and the employees laid-off, only three employees were within a year of reaching eligibility, while another four were roughly two years away; a majority of the Van Dyke employees needed more than five more years for their benefits to fully vest. And two of the employees that TRW did recall--which was done on the basis of seniority per the bargaining agreement--established their benefits eligibility while working at the Mancini plant. This undercuts the plaintiffs' claim.

Although TRW vastly overstated the deference its business decisions are afforded, it is true that, when plants are shut down, there will necessarily be a variety of factors at play beyond how close certain employees might be to vesting, and thus plaintiffs have a lot to wade through to establish liability. This is not due to any presumption or legal threshold erected against their claims; the facts of these cases will always be myriad and complicated, and plaintiffs must show that

the employer, in the midst of all this, in some way targeted certain employee benefits or rights for interference. This is not to say that employers always act properly--some are foolish--it is instead that the facts do not always make it obvious that this was so. To succeed, § 510 plaintiffs do not need "smoking gun" evidence, but, they do need more than plaintiffs have here. We thus affirm the district court's grant of summary judgment to TRW.

III.

Finally, plaintiffs also claim that the district court improperly denied their motion for relief from judgment on the basis of newly discovered evidence. *See* Fed. R. Civ. P. 60(b)(2). That denial is reviewed for abuse of discretion. *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998). To prevail, the moving party must show that it used "due diligence" in obtaining the information and that the evidence is so material that it is outcome determinative--that the ultimate result would have been different were plaintiffs to have had the evidence. *Id.*

Plaintiffs relied on two pieces of evidence in support of their motion. First, they relied on an affidavit of plaintiff Matthew Burdo stating that, in February 2008, he had spoken with a man named "Dave" who was sitting in the Mancini Drive plant's parking lot eating in a sandwich. "Dave" stated that the Mancini facility had been expanded and that there was an additional facility going up across the street. Second, plaintiffs relied on documents showing that a building permit was issued in June 2007 to expand the Mancini plant. The district court concluded that plaintiffs failed to exercise due

diligence in gathering this evidence because they (a) failed to identify any obstacles to their obtaining it, (b) the Mancini facility's expansion was outwardly visible to anyone who visited, and (c) plaintiffs could have spoken to employees at any earlier time to inquire of what kind of work they were engaged in. Nevertheless, the district court further concluded that, even assuming diligence, the new evidence would not have altered the ultimate conclusion. We agree.

As observed above, the Van Dyke plant was shut down largely due to overcapacity concerns, and the Mancini-expansion would not have altered this calculus: even with the expansion, the Mancini plant would still be less than a third of the size of the Van Dyke one (85,000 square feet compared with 300,000). Moreover, that decision came some time after the decision was made to discharge these employees and shut down Van Dyke, and thus was remote from the decision to close it down. Finally, we agree with the district court that the information contained in Burdo's affidavit--which relies almost entirely on statements made by sandwich "Dave"--even where admissible, were not entirely credible: we do not even know for sure if he was a TRW employee. Thus, the district court properly denied plaintiffs' 60(b) motion. n1

IV.

For the above reasons, we affirm.

Footnotes

*The Honorable Michael H. Watson, United States District Judge for the Southern District of Ohio, sitting by designation.

1TRW contends that, even if plaintiffs were successful, their claim would have no remedy. They rely on the Tenth Circuit's opinion in *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004), and this Court's unpublished opinion in *Alexander v. Bosch Automotive Systems, Inc.*, 232 Fed. App'x 491(6th Cir. 2007). Plaintiffs, in turn, point out the severe criticism these decisions have received, and ask us not to follow them. *See, e.g., Millsap*, 368 F.3d at 1261 (Lucero, J., dissenting); *Eichorn v. AT&T Corp.*, 489 F.3d 590, 591-94 (3d Cir. 2007) (Ambro, J., concurring in the denial of rehearing en banc); Lorraine Schmall & Nathan Ihnes, *Failure of Equity: Discriminatory Plant Closings as an Irremediable Injury Under ERISA*, 55 CATH. U. L. REV. 81, 82 (2005) ("The appellate decision in *Millsap* was wrong."). Because we conclude that plaintiffs' claim fails on the merits, we need not wade into this murky pond, and leave resolution of that question for another day.

Case No. 06-14276

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JERRY CRAWFORD, CHARLES ANNABEL DARRYL BALLARD, MATTHEW BURDO, DON HOSKINS, ROY LANNING, PETER "LARRY" POWELL, WANDA SIMPSON, and DANIEL SLANE, Plaintiffs,

v.

TRW AUTOMOTIVE U.S. LLC, Defendant.

December 28, 2007, Argued
December 28, 2007, Filed

OPINION

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on December 28, 2007.

PRESENT: THE HONORABLE PATRICK J. DUGGAN, U.S. DISTRICT COURT JUDGE

Plaintiffs initiated this lawsuit after their former employer, Defendant TRW Automotive U.S. LLC ("TRW"), closed the manufacturing and assembly plant where they worked. TRW subsequently filed a motion

for summary judgment, which this Court granted in an opinion and order entered on October 24, 2007. Presently before the Court is Plaintiffs' motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e), filed November 7, 2007. With the Court's permission, TRW filed a response to the motion on November 29, 2007. For the reasons that follow, the Court denies the motion.

Standard of Review

Motions to alter or amend a judgment pursuant to Rule 59(e) may be granted only if there is "'(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 496 (6th Cir. 2006) (quoting *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)). A motion for reconsideration will be granted only if the moving party demonstrates "a palpable defect by which the court and the parties have been misled" and that "correcting the defect will result in a different disposition of the case." E.D. Mich. LR 7.1(g)(3). A motion that merely presents the same issues already ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. E.D. Mich. LR 7.1(g).

Analysis

Plaintiffs contend that the Court committed several errors which, if corrected, mandate a different result with respect to TRW's motion for summary judgment. First, Plaintiffs are under the impression that the Court believed the Mancini Drive facility was an existing facility, with an existing workforce, when the

decision was made to place the DaimlerChrysler module work there. The Court did not understand either to be true and never stated as much in its October 24, 2007 decision. In fact, the Court understood that the Mancini Drive facility did not exist and that employees were hired to work there only after DaimlerChrysler awarded the module work to TRW.

Second, Plaintiffs contend that the Court erred in finding that Section 510 of ERISA does not proscribe intentional refusals to recall an employee from layoff. Relying on *Pickering v. USX*, 809 F. Supp. 1501 (D. Utah 1992), Plaintiffs argue that the statute applies to an employer's failure to recall workers from layoff in order to avoid the accrual of employee pension benefits. The Court in fact acknowledged in its October 24, 2007 opinion and order that "'ERISA § 510 affords protection from discrimination that interferes 'with the attainment of any right to which such participant may become entitled under [an ERISA] plan.'" (10/24/07 Op. and Order at 12, quoting *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 670 (7th Cir. 1993).) This would include an employer's policy of using layoffs to avoid employees' accrual of ERISA benefits and a claim that "a motivating factor" in the employer's decision to avoid recalls was the interference with the obtainment of employee benefits. *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987). This Court found, however, that "Plaintiffs present[ed] no evidence to suggest that TRW considered employees' eligibility for ERISA benefits when selecting who to recall [from layoff]." (*Id.* at 11.)

In their motion for reconsideration, Plaintiffs rely on the same emails to demonstrate that TRW refused to recall employees from layoff to interfere with their

ERISA benefits that they provided in response to TRW's motion for summary judgment. A motion for reconsideration that merely presents the same issues already ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. E.D. Mich. LR 7.1(g).

For the same reason, the Court rejects Plaintiffs' third argument that the Court erred in analyzing their claim that the Mancini Drive facility was an alter ego of the Van Dyke Plant where they worked. Admittedly, the Court did not set forth in detail the basis for its conclusion that Plaintiffs had not produced evidence to create a genuine issue of material fact with respect to their claim that the Mancini Drive facility was an alter ego operation. Rather, the Court believed that its reference to pages 4-6 of TRW's reply brief would be sufficient to alert Plaintiffs to the Court's reasons for rejecting the alter ego theory. The Court again refers to the facts set forth in TRW's reply (which facts Plaintiffs failed to present evidence to dispute) including, but not limited to the following:

> 1. The Van Dyke Plant and the Mancini Drive facility did not have substantially identical business purposes, operations, or equipment. The Van Dyke Plant manufactured ball joints, steering linkages, tie rods, and related components. The Mancini Drive facility acquires components from suppliers dictated by its customers and simply assembles them.
>
> 2. TRW did not continue the operations of the Van Dyke Plant at the Mancini Drive facility. The module work performed at Mancini Drive was never performed at the Van Dyke Plant, the

work performed at the Van Dyke Plant was never transferred to the Mancini Drive facility, and the work performed at the Van Dyke Plant is not being performed at the Mancini Drive facility. Instead, the work performed at the Van Dyke Plant was transferred to a pre-existing TRW plant in Canada.

3. The salaried staff at the Van Dyke Plant was not transferred to the Mancini Drive facility. The Van Dyke Plant had a salaried staff of 37 employees. Of the approximately 20 salaried staff at the Mancini Drive facility, only five of these employees ever worked at the Van Dyke Plant.

4. TRW did not disguise its operations of the Mancini

Drive facility.

Lastly, Plaintiffs argue that the Court erred in evaluating the evidence they presented to support their Section 510 claim. More specifically, Plaintiffs contend that they needed to establish that interference with their attainment of ERISA benefits was only *a* factor in TRW's decision to close the Van Dyke Plant, not that it was a *motivating* factor. Plaintiffs argue that they presented "overwhelming evidence" that TRW decided to close the plant to interfere with their ERISA rights. Plaintiffs also contend that the Court erred in finding that they failed to demonstrate pretext.

As the Court stated in its October 24 opinion and order: ". . . to demonstrate a violation of Section 510, it is not sufficient for the plaintiff to show that the reduction of retiree costs was *a* factor in the employer's decision.

The plaintiff must show that avoiding those costs was 'a *motivating* factor.'" (10/24/07 Op. and Order at 18, quoting *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992).) The Sixth Circuit alternatively stated in *Humphreys:* "[The] plaintiff must come forward with evidence from which a reasonable jury could find that [the] defendant's desire to avoid pension liability was a *determining* factor in [the] plaintiff's discharge." *Id.* at 1044 (citation omitted). The employer's conduct must be motivated by a "specific intent to interfere with the attainment of pension eligibility." *Gavalik*, 812 F.2d at 851-52. "No ERISA cause of action [under Section 510] lies where the loss of . . . benefits [i]s a consequence of, but not a motivating factor behind, a termination of employment." *Id.* (quoting *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff'd*, 742 F.2d 1441 (2d Cir. 1983)). In this Court's opinion, Plaintiffs do not proffer sufficient evidence to create a genuine issue of fact that TRW's desire to avoid pension liability was a determining factor in their discharge.

Rather the evidence demonstrated that, due to a decrease in business, TRW faced significant overcapacity within its North American Braking Suspension group by 2004. The Van Dyke Plant, in particular, had experienced shrinking sales and only ten percent of its production capacity was being utilized. For this reason, TRW decided to close several facilities within its North American Braking Suspension group.

While the cost of ERISA benefits was one factor that made it difficult for TRW to compete and that caused TRW to lose business, the evidence demonstrated that there were other factors, most notably higher wages at TRW's unionized North American facilities. Evidence

that the cost of ERISA benefits at the Van Dyke Plant was a factor contributing to its loss of business does not demonstrate that TRW had the specific intent to interfere with those benefits when it decided to close the plant. As the Sixth Circuit has stated, "the mere fact that [the employer] sought to save money cannot show pretext." *Morabito v. Master Builders, Inc.*, No. 96-3898, 1997 U.S. App. LEXIS 30112, 1997 WL 668955, at *3 (6th Cir. Oct. 27, 1997) (unpublished opinion) (citing *Humphreys*, 966 F.2d 1037). Similarly, the fact that TRW calculated curtailment costs to determine the costs of closing its various plants within its North American Braking Suspension group, and therefore which plants it would be more cost-effective to close, does not establish pretext. The Court also is not convinced that it erred in applying the business judgment rule in rejecting Plaintiffs' claim that TRW should have placed the DaimlerChrysler module work in the Van Dyke Plant.

Conclusion

For the above reasons, the Court concludes that it did not commit a palpable error in deciding TRW's motion for summary judgment.

Accordingly,

IT IS ORDERED, that Plaintiffs' motion for reconsideration is **DENIED.**

s/ PATRICK J. DUGGAN

UNITED STATES DISTRICT JUDGE

Case No. 06-14276

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JERRY CRAWFORD, CHARLES ANNABEL DARRYL BALLARD, MATTHEW BURDO, DON HOSKINS, ROY LANNING, PETER "LARRY" POWELL, WANDA SIMPSON, and DANIEL SLANE, Plaintiffs,

v.

TRW AUTOMOTIVE U.S. LLC, Defendant.

October 24, 2007, Argued
October 24, 2007, Filed

OPINION AND ORDER

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on October 24, 2007.

PRESENT: THE HONORABLE PATRICK J. DUGGAN

U.S. DISTRICT COURT JUDGE

Plaintiffs initiated this lawsuit after their former employer, Defendant TRW Automotive U.S. LLC ("TRW"), closed the manufacturing and assembly plant where they worked on Van Dyke Road in Sterling Heights, Michigan ("Van Dyke Plant"). Plaintiffs allege that TRW closed the Van Dyke Plant to prevent employees from obtaining pension and retiree health

care benefits, in violation of Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. On March 31, 2007, the Court certified this matter as a class action. [1] Now before the Court is TRW's motion for summary judgment. The motion has been fully briefed and, on October 11, 2007, this Court held a motion hearing. For the reasons set forth below, the Court grants TRW's motion.

I. Standard for Summary Judgment

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

The movant has the initial burden of showing "the absence of a genuine issue of material fact." *Id.* at 323. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). To demonstrate a genuine issue, the non-movant must

present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. *See Liberty Lobby*, 477 U.S. at 252, 106 S. Ct. at 2512.

The court must accept as true the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. *See id.* at 255. The inquiry is whether the evidence presented is such that a jury applying the relevant evidentiary standard could "reasonably find for either the plaintiff or the defendant." *See id.*

II. Factual Background

TRW, an indirect subsidiary of TRW Automotive Holdings Corporation ("TRW Holdings"), operated the Van Dyke Plant. At this 370,000 square foot facility, which was part of TRW's North American Braking and Suspension group, employees manufactured front suspension components for automobile manufacturers. Specifically, the Van Dyke Plant produced ball joints, steering linkages, tie rods, and related components. Once produced, the components were shipped to automobile manufacturers for assembly into a front end suspension, which ultimately would be assembled into an automobile or truck.

Employees at the Van Dyke Plant were represented by the United Automobile Workers of America ("UAW"). TRW and the UAW were parties to a collective bargaining agreement that covered the terms and conditions of employment of bargaining unit employees at the Van Dyke Plant. TRW and the UAW also negotiated a defined pension plan for the benefit of Van Dyke Plant employees. Pursuant to the pension plan, employees who retired from active service with 30 or

more years of "benefit service" were entitled to retirement benefits, as defined by the plan. Benefit service generally was earned for each year in which the employee worked 1680 hours; however if an employee was laid off during a given calendar year, the employee had to work 170 hours to acquire pension credits for the year. Employees who retired from active service on or after age 55, with 10 or more years of benefit service, were entitled to an early retirement benefit. Under the terms of the collective bargaining agreement and pension plan, benefit service only was earned for work performed at the Van Dyke Plant.

TRW claims that by 2004, it faced significant overcapacity within its North American Braking and Suspension group (hereafter "Suspension group"), which included the Van Dyke Plant. Therefore, in approximately September 2004, the Suspension group formulated a restructuring plan to reduce the number of its North American manufacturing facilities. As part of this plan, TRW analyzed the costs and benefits of shutting down several facilities in North America. In August 2005, TRW announced that it would close the Van Dyke Plant by July 2006, and transfer all assembly work to a plant in Canada.

Before TRW decided to close the Van Dyke Plant, it considered placing certain suspension module work for DaimlerChrysler there. DaimlerChrysler presented this module work to TRW in late 2003. At that time, DaimlerChrysler contacted TRW's DaimlerChrysler North American Suspension System sales account manager, Howard Puuri, and asked him if TRW would bid on module assembly work for four North American DaimlerChrysler plants.

The module work did not require any manufacturing. Instead, TRW would receive component parts from other manufacturers selected by DaimlerChrysler, assemble the parts into various modules (e.g. front suspension modules such as power steering components and brake components and rear suspension modules such as brake components), sequence the modules for ready assembly into vehicles, and transport the modules to the DaimlerChrysler assembly plant. The facility producing the module parts needed at least ten shipping bays adjacent to the assembly line and had to be within close proximity to the DaimlerChrysler site where the parts would be fed into an automotive assembly line. [2] One of the DaimlerChrysler plants to be supplied with the module parts was located in Sterling Heights, Michigan. Therefore, DaimlerChrysler initially asked TRW to prepare its bid using the existing Van Dyke Plant as the location for the module work. Bruce Hoover, TRW's Director of Operations and General Manager for the Linkage and Suspension product line, ultimately determined that the Van Dyke Plant was not a suitable location for the module work. (Pls.' Resp., Ex. 28 at 35.)

DaimlerChrysler eventually awarded the module work to TRW. Kelsey-Hayes Company, another subsidiary of TRW Holdings, thereafter leased a 70,000 square foot facility on Mancini Drive in Sterling Heights, Michigan, a short distance from the Van Dyke Plant. In August 2006, Kelsey-Hayes began regular production of the modular assemblies for DaimlerChrysler at the Mancini Drive facility. [3] Kelsey-Hayes employs regular, full-time employees at the Mancini Drive plant. Those

employees are not represented by a union and they do not have a defined-benefit pension plan.

In July 2006, before the Van Dyke Plant closed, the UAW and TRW entered into plant closing negotiations. During these negotiations, the UAW and TRW discussed preferential hiring at the Mancini Drive facility for Van Dyke Plant employees and "bridging" employees at the Van Dyke Plant who were close in benefit service years to reach retirement eligibility. TRW also proposed to pay individuals a severance benefit of $ 100,000 if they opted out of their available retiree health benefits. The UAW and TRW ultimately were not able to reach a plant closing agreement.

The Van Dyke Plant eventually closed its doors on January 26, 2007. At the time, three employees missed a 30-year retirement by less than one year of benefit service (Plaintiffs Jerry Crawford, Don Hoskins, and Larry Powell). All three employees had been involuntarily laid off in 2005. Four additional employees missed a 30-year retirement benefit by fewer than two years of benefit service.

Plaintiffs initiated this lawsuit on September 28, 2006. In their complaint, Plaintiffs allege that TRW violated Section 510 of ERISA by (1) failing to recall employees to work following a layoff in order to prevent the employees from attaining retirement eligibility, and (2) closing the Van Dyke Plant and refusing to transfer employees to the Mancini Drive facility for the purpose of preventing employees from attaining retirement eligibility.

III. Applicable Law and Analysis

Section 510 of ERISA provides in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, . . .

29 U.S.C. § 1140. The Sixth Circuit has noted that this Section "was designed to prevent 'unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights.'" *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1113 (6th Cir. 2001) (quoting *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980)). In order to prevail on a Section 510 claim, the plaintiff must show that the defendant had the specific intent to violate ERISA. *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992). "The plaintiff is not required to show that the employer's sole purpose in discharging him was to interfere with his pension benefits, but rather that it was 'a motivating factor' in the decision." *Id.* (citations omitted).

To evaluate a Section 510 claim, the Sixth Circuit, like many courts, applies the burden-shifting framework the Supreme Court set forth in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). *Humphreys*, 966 F.2d at 1043. First, the plaintiff must establish a *prima facie* case by presenting evidence of "'(1) prohibited employer

conduct (2) taken for the purpose of interfering (3) with the attainment of any [ERISA] right to which the employee may become entitled.'" *Id.* (quoting *Gavalik v. Cont'l Can Co.*, 812 F.2d 834, 853 (3d. Cir. 1987)). If the plaintiff sets forth such a *prima facie* case, "it is the employer's burden to 'introduce admissible evidence of a legitimate, nondiscriminatory reason for its challenged action.'" *Id.* If the employer carries its burden, "the plaintiff must either prove that the interference with [the plaintiff's ERISA rights] was a motivating factor in the employer's actions or prove that the employer's proffered reason is unworthy of credence." *Id.*

TRW raises five general arguments in support of its motion for summary judgment. First, TRW argues that Plaintiffs cannot establish a *prima facie* case under Section 510. With respect to TRW's closure of the Van Dyke Plant, TRW contends that Plaintiffs cannot establish that it closed the plant with the specific intent to interfere with employees' attainment of ERISA benefits. With respect to Plaintiffs' claim that TRW failed to transfer employees to the Mancini Drive facility in order to prevent them from attaining benefits, TRW argues that Plaintiffs' claim is not actionable under Section 510. TRW also argues that its decision to close the Van Dyke Plant is not actionable under Section 510. Next, TRW maintains that, even if Plaintiffs establish a prima facie case under Section 510, they cannot produce evidence to demonstrate that TRW's legitimate reason(s) for its actions was a pretext for discrimination. Lastly, TRW contends that, even if Plaintiffs demonstrate a Section 510 violation, there are no remedies available to them under ERISA.

A. Whether TRW's decision to close the Van Dyke Plant is actionable under Section 510

Relying on several cases, primarily *Coomer v. Bethesda Hospital, Inc.*, 370 F.3d 499, 508 (6th Cir. 2004), TRW argues that corporate plant closing decisions that affect ERISA plans are not actionable under Section 510. (TRW's Br. in Supp. of Mot. at 15- 16.) In support of its assertion, TRW quotes the Sixth Circuit's statement in that case that "[n]othing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." (*Id.* at 15 (quoting *Coomer*, 370 F.3d at 508).) TRW further relies on the *Coomer* court's pronouncement that "'[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare [or pension benefit] plans.'" 370 F.3d at 508 (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995)).

Coomer, however, does not guide the Court's decision in this case because it did not involve a plant closure or similar employer conduct. *Coomer* involved a plan administrator's decision to amend the terms of an employee pension plan to allow for a lump sum distribution of pension benefits to one employee and its subsequent denial of other employees' requests for an amendment to allow a lump sum distribution to them. As the *Coomer* plaintiffs did not allege or show that the plan administrator's alleged discrimination was designed to retaliate against employees for their exercise of a right under the plan or to interfere with employees' attainment of pension benefits to which they were entitled under the plan, the court found no Section 510 violation. *Id.* at 509. The court simply held

that unequal treatment in the design of a plan does not give rise to a cause of action under Section 510. *Id.*

Two of the other cases on which TRW principally relies involved plant closures: *Adcox v. Teledyne, Inc.*, 21 F.3d 1381 (6th Cir. 1994) and *Andes v. Ford Motor Co.*, 315 U.S. App. D.C. 120, 70 F.3d 1332 (D.C. Cir. 1995). Neither case, however, supports TRW's argument that an employer's decision to close a plant can never give rise to a Section 510 claim, as the courts' rejection of the plaintiffs' claims in both cases was premised instead on the absence of evidence of an intent by the defendants to interfere with the employees' ERISA rights. In fact the D.C. Circuit specifically stated in *Andes* that, under certain circumstances, Section 510 could be implicated by a company's basic organizational decision (e.g. shutting down a particular plan or division). 70 F.3d at 1338 (explaining that a company's decision to shutdown a subdivision where most employees soon to be eligible for a rich benefits package worked may "merely mask[] a determination to interfere with the employees' attainment of benefit plan rights"); *see also Gavalik v. Cont'l Can Co.*, 812 F.2d 834 (1987) (finding a Section 510 violation where the employer decided to close down an entire production line causing a loss of employment where the decision was part of a "liability avoidance" plan to "avoid triggering future vesting" of employees' pension benefits).

The Court concludes that an employer's decision to close a plant, although not always actionable under Section 510, is actionable if a motivating factor for the employer's decision is its desire to interfere with employees' attainment of ERISA benefits.

B. Whether TRW's failure to recall Plaintiffs from lay-off and its refusal to transfer Van Dyke Plant employees to the Mancini Drive facility are actionable under Section 510

In support of their Section 510 claim, Plaintiffs also allege that TRW "failed to recall [] Plaintiffs to work following a layoff for the specific purpose of preventing them from establishing eligibility for their 30 year service pension and obtaining their company paid for medical and health insurance." (Compl. P 62.) Plaintiffs further allege a Section 510 violation based on TRW's failure to transfer employees from the Van Dyke Plant to the Mancini Drive facility. TRW maintains that neither forms of conduct are actionable under Section 510. The Court agrees.

Section 510 prohibits an employer from "discharg[ing], fin[ing], suspend[ing], expel[ling], disciplin[ing], or discriminat[ing] against a participant or beneficiary . . . for the purpose of interfering with the attainment of [ERISA benefits]." 29 U.S.C. § 1140. According to its plain language, the statute does not apply to an employer's decision whether to *recall* employees from layoff or whether to *transfer* employees to a different facility. Plaintiffs fail to present any case where the statute was applied to such employment decisions.

To the extent Plaintiffs contend that TRW "discriminate[d]" against employees in deciding who to recall from layoff, Plaintiffs present no evidence to suggest that TRW considered employees' eligibility for ERISA benefits when selecting who to recall. The evidence instead shows that TRW recalled employees based on their seniority and that, because they were recalled, at least two employees accrued sufficient

pension credits to retire. (Def.'s Mot., Ex. 12 at 157; Ex. 26). Further, with respect to Plaintiffs' claim that TRW should have transferred Van Dyke Plant employees to the Mancini Drive facility, the collective bargaining agreement between TRW and the UAW provided that employees accrued benefit service hours for work performed only at the Van Dyke Plant. "ERISA § 510 affords protection from discrimination that interferes 'with the attainment of any right to which such participant may become entitled *under the plan*." *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 670 (7th Cir. 1993) (emphasis added) (quoting 29 U.S.C. § 1140). An employee "does not have a *right* to treatment that is contrary to the terms of the plan, . . ." *Id.* (emphasis in original).

Plaintiffs argue that the Mancini Drive facility is simply an alter ego operation of the Van Dyke Plant, which TRW opened to avoid its ERISA obligations. To be considered an alter ego operation, the Mancini Drive facility must be a "disguised continuance" of the Van Dyke Plant. *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 586-87 (6th Cir. 2006) (citation omitted). Stated differently, the Mancini Drive facility must represent "'a mere technical change in the structure or identity of the [Van Dyke Plant] . . . without any substantial change in its ownership or management.'" *Id.* at 586 (quoting *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 259 n.5, 94 S. Ct. 2236, 41 L. Ed. 2d 46 (1974)). For the reasons set forth in TRW's reply brief, however, the Court finds that the alter ego doctrine has no application in this case. (*See* Defs.' Reply Br. at 4-6.)

C. Whether Plaintiffs establish a prima facie case under Section 510

To support their prima face case under Section 510, Plaintiffs contend that TRW closed the Van Dyke Plant--as well as other unionized plants where collective bargaining agreements entitled employees to retiree benefits--in order to prevent employees from attaining ERISA benefits. Plaintiffs contend that the closure of these facilities was part of a scheme that TRW devised to reduce its legacy costs. Plaintiffs also argue that, as part of this benefits avoidance scheme, TRW refused to bridge benefits for older employees close to attaining retirement benefits during its plant closing negotiations with the union.

In support of their prima facie case, Plaintiffs present company documents in which TRW recognizes the need to reduce its legacy costs. (*See, e.g.*, Pls.' Resp., Ex. 2.) In one company document, TRW identifies the following as part of its restructuring plan: "Reduce heritage costs . . . by bringing in new employees with modified compensation packages." (*Id.* at 05084.) Plaintiffs also present company documents reflecting that, in deciding whether to close the Van Dyke Plant, TRW specifically identified by name and benefit savings those employees who would be ineligible for ERISA benefits if the plant closed. (Pls.' Resp., Ex. 5.) Plaintiffs also rely on the deposition testimony of Ron Muckley, the Vice President of Operations for the Suspension Group, in which Mr. Muckley indicates that pension costs was one of the reasons that TRW selected the Van Dyke Plant for closure. (Pls.' Resp., Ex. 28 at 152-53.) Finally, Plaintiffs point out that TRW transferred the work of the Van Dyke Plant to a non-

union facility where legacy or heritage costs were reduced or were non-existent.

The Sixth Circuit has stated that "[a] plaintiff's burden in establishing a prima facie case is not intended to be an onerous one." *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1114 (2001). With that guideline in mind, this Court concludes that Plaintiffs present sufficient evidence to demonstrate a *prima facie* case under Section 510. A trier of fact could reasonably infer from Plaintiffs' evidence that TRW closed the Van Dyke Plant to interfere with employees' attainment of retirement benefits.

D. Whether TRW demonstrates a legitimate, nondiscriminatory reason for its conduct

The Court now must determine whether TRW has met its burden of showing that it had a legitimate, nondiscriminatory reason for closing the Van Dyke Plant. The Court finds that TRW has satisfied its burden.

TRW contends that it made the decision to close the Van Dyke Plant due to the plant's overcapacity. TRW maintains that the Van Dyke Plant--like other facilities in its Suspension group-- was underutilized by 2004, resulting in prohibitive overhead costs. TRW explained the cause of this underutilization in one company document: "TRW 'has not been able to secure new business for future growth for the Suspension Group' due to its '[c]ore [c]ustomers: Ford and DCX hav[ing] los[t] significant market share and . . . having financial ills' and because '[t]ransnational OEM's have gained market share and do not have the legacy costs of the big three competitive products to market[.]'" (Defs.'

Mot., Ex. 9.) This document further reports that only 30,000 square feet of the Van Dyke Plant's over 300,000 square feet of production capacity was being utilized, resulting in fixed costs accounting for 26% of every sales dollar. (*Id.*) According to TRW, acceptable fixed costs are between 10-15%. (*Id.*) TRW explains that in response to the decrease in business for the Suspension group, it devised a plan to shut down several facilities in North America, including the Van Dyke Plant. Although acknowledging that it considered legacy costs in selecting the Van Dyke Plant and other North American facilities for shutdown, TRW maintains that these costs were only "one reason among several." (Pls.' Resp., Ex. 28 at 152-53.)

While Plaintiffs argue that TRW has never been under severe financial stress and that the Van Dyke Plant was profitable and had sales in the billions of dollars for several years before it closed, *see infra*, Plaintiffs do not dispute that the plant was underutilized by 2004. In fact Plaintiffs specifically acknowledge the financial troubles that plagued the Van Dyke Plant in their response brief: "Indeed, the sales generated at the Van Dyke Plant, by the [F]all of 2004, did not support the fixed costs required to operate the business." (Pls.' Resp. Br. at 7.) Moreover, Plaintiffs' own figures reflect that the Van Dyke Plant experienced declining sales of nearly 30% between 2003 and 2005. (*Id.* at 3.) The decision with which Plaintiffs really quarrel is TRW's decision to not place the DaimlerChrysler module work at the Van Dyke Plant, which they claim would have brought the plant to full capacity and revitalized its sales.

TRW provides evidence, however, to demonstrate that its decision to place the module work at a new facility,

instead of at the Van Dyke Plant, was based on its business judgment and not on a desire to interfere with Plaintiffs' ERISA benefits. Bruce Hoover, Director of Operations and General Manager for TRW's Linkage and Suspension product line, made the ultimate decision to place the module work at a new facility. During his deposition in this case, Mr. Hoover identified several reasons why he reached this decision. (Defs.' Mot., Ex. 11 at 39-55.)

First, Mr. Hoover explained that the module work was a different business than the work performed at the Van Dyke Plant. (*Id.* at 39-41.) As Mr. Hoover elaborated, whereas employees at the Van Dyke Plant primarily were involved in manufacturing component parts which may have involved the assembly of those parts, the module work required no manufacturing and the assembly of entire systems. (*Id.*) Second, Mr. Hoover explained that the Van Dyke facility was too big for the module work. (*Id.* at 42.) Only 70,000 square feet was needed for the module work. (*Id.*) Although existing work at the Van Dyke Plant used 35,000-50,000 square feet, the combined work still did not utilize the plant's total floor space of 300,000-370,000 square feet. Mr. Hoover's third reason for rejecting the Van Dyke Plant for the module work was his belief that the plant did not have a sufficient number of shipping docks or roads leading into and out of the facility. (*Id.* at 43-44.) Mr. Hoover determined that changing the infrastructure to add shipping docks and roads to handle increased traffic would require substantial capital investment. (*Id.* at 43-44.) Finally, Mr. Hoover explained that TRW wanted to lease a facility for the module work so that it could walk away from the

business after the five year contract for the work expired. (*Id.* at 44-45.)

Based on the above, the Court finds that TRW establishes legitimate, nondiscriminatory reasons for its decision to not place the DaimlerChrysler module work at the Van Dyke Plant and to ultimately close the Van Dyke Plant. As TRW demonstrates, its closure of the Van Dyke Plant was part of an overall effort to consolidate its Northern American facilities in the Suspension group. This effort was devised by TRW in response to decreased work for those facilities and the facilities' inability to compete as a result of uncompetitive wage structures. While the cost of ERISA benefits was one factor that rendered the wage structures within certain facilities uncompetitive, those were not the only costs. For example, the hourly wages among the facilities were significantly different. (*See, e.g.*, Pls.' Resp., Ex. 28 at 95-96.) "'Measures designed to reduce costs in general that also result in an incidental reduction in benefit expenses do not suggest discriminatory intent.'" *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993) (quoting *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1224 (11th Cir. 1993)).

E. Whether Plaintiffs demonstrate that TRW's reasons were pretextual

As TRW sets forth legitimate, nondiscriminatory reasons for its decision to close the Van Dyke Plant and place the module work at a different facility, Plaintiffs must present evidence to show that TRW's decision was more likely motivated by the desire to interfere with their ERISA benefits or that TRW's proffered explanation is unworthy of credence. *Gavalik*, 812 F.2d at 853. Plaintiffs argue that "[t]he record is full of

documents indicating [TRW's] desire to reduce legacy costs" and that "[e]ligiblity for pension and retiree health benefits was a factor in [TRW's] decision-making regarding plant closings." (Pls.' Resp. Br. at 29-30.)

As indicated earlier, however, to demonstrate a violation of Section 510, it is not sufficient for the plaintiff to show that the reduction of retiree costs was *a* factor in the employer's decision. The plaintiff must show that avoiding those costs was "a *motivating* factor." *Humphreys*, 966 F.3d at 1043. At most, Plaintiffs' proofs demonstrate that TRW considered legacy costs as one, among several, factors in deciding to reduce the number of facilities in its North American Suspension group and in selecting which facilities to close.

Plaintiffs also assert, however, that they can demonstrate that TRW's asserted reason for closing the Van Dyke Plant--i.e. overcapacity--is unworthy of credence. As set forth previously, however, Plaintiffs acknowledge that TRW's Suspension group in general and its Van Dyke Plant in particular were faced with significant overcapacity by 2004, and that the latter's sales had decreased from $ 72 million in 2003 to $ 47 million in 2005. (*See* Pls.' Resp. Br. at 3.) Plaintiffs claim of pretext relates to TRW's stated reasons for not placing the DaimlerChrysler module work at the Van Dyke Plant in order to resolve the plant's overcapacity problem and revitalize its sales. According to Plaintiffs, TRW's stated reasons are not worthy of credence. However Plaintiffs fail to establish that TRW's stated reasons are not credible; instead, they only show that they disagree with TRW's business judgment. [4] "The soundness of an employer's business judgment . . . may not be questioned as a means of showing pretext."

Brocklehurst v. PPG Indus., Inc., 123 F.3d 898 (6th Cir. 1997) (internal quotation marks and citations omitted).

IV. Conclusion

TRW's refusal to recall certain employees from layoff and to transfer Plaintiffs to the Mancini Drive facility do not fall within the statute's prohibited conduct. While a company's decision to close a facility may implicate Section 510, the plaintiff must show that the company's selection of the facility was motivated by a desire to interfere with the workers' ERISA benefits. In the present case, Plaintiffs fail to raise a genuine issue of material fact with regard to whether such a desire was a determinative or motivating factor in TRW's decision.

Accordingly,

IT IS ORDERED, that TRW's motion for summary judgment is **GRANTED**.

s/ PATRICK J. DUGGAN

UNITED STATES DISTRICT JUDGE

Footnotes

1 The Class is defined as follows:

> Employees who did not accrue 360 pension credits at the time the [Van Dyke Plant] ceased active production, and, on or before that date, were on the layoff or active rolls of the [Van Dyke Plant] and were not permitted to transfer to the Mancini plant or retired prematurely because they were informed that they would not be permitted to transfer to the Mancini plant.

See 3/21/07 Op. and Order Granting Plaintiffs' Mot. for Class Cert.

2 Close proximity to DaimlerChrysler's assembly line and increased traffic in and out of the module work facility were necessary because, after assembly, the component parts needed to arrive at the vehicle assembly line within 60 to 90 minutes. (Pl.'s Resp., Ex. 37 at 46.)

3 While the Court assumes that TRW subcontracted the module work to Kelsey-Hayes, the parties actually have not explained how Kelsey-Hayes acquired the work.

4 For example, to counter TRW's claim that there was insufficient ingress and egress at the Van Dyke Plant to accommodate the module work, Plaintiffs note a discrepancy in the testimony regarding the existing number of loading docks at the plant. One witness testified that there were two loading docks, requiring the building of eleven more; whereas Plaintiffs claim that there were seven existing loading docks. Plaintiffs acknowledge that, even accepting their number, at least a few loading bays would need to be added; but they argue that TRW "does not state how much adding a few more loading bays would cost" and "it is difficult to imagine that it would have been more than the initial $ 2 million in capital costs to retool various machines in preparation for moving or the cost of a new building." (Pls.' Resp. Br. at 31.) The Court believes that the decision as to how to invest $ 2 million, is a decision left to TRW.

Nos. 08-1132/08-1777

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERRY CRAWFORD, et al.,
Plaintiffs-Appellants,

v.

TRW AUTOMOTIVE U.S. LLC, Defendant-Appellee.

Filed 5/22/09

Before: MARTIN and COOK, Circuit Judges; and WATSON,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

Footnote

*The Honorable Michael H. Watson, United States District Judge for the Southern District of Ohio, sitting by designation.

Filed 4/30/2008
Case No. 06-14276

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JERRY CRAWFORD, CHARLES ANNABEL DARRYL BALLARD, MATTHEW BURDO, DON HOSKINS, ROY LANNING, PETER "LARRY" POWELL, WANDA SIMPSON, and DANIEL SLANE, Plaintiffs,

v.

TRW AUTOMOTIVE U.S. LLC, Defendant.

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on June 10, 2008.

PRESENT: THE HONORABLE PATRICK J. DUGGAN U.S. DISTRICT COURT JUDGE

Presently before the Court is Plaintiffs' motion for reconsideration of this Court's April 30, 2008 opinion and order denying Plaintiffs' Rule 60(b)(2) motion. For the reasons that follow, the Court denies the motion.

Plaintiffs initiated this lawsuit after their former employer, Defendant TRW Automotive U.S. LLC ("TRW"), closed the manufacturing and assembly plant

where they worked. TRW subsequently filed a motion for summary judgment, which this Court granted in an opinion and order entered on October 24, 2007. The Court entered a judgment in favor of TRW and against Plaintiffs on the same date. An amended judgment was entered on November 16, 2007. Plaintiffs thereafter filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e), which this Court denied on December 28, 2007. On January 24, 2008, Plaintiffs filed a notice of appeal. On March 5, 2008, Plaintiffs filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(2), which this Court denied on April 30, 2008. Plaintiffs filed the pending motion for reconsideration on May 14, 2008.[1]

Standard of Review

Eastern District of Michigan Local Rule 7.1(g) provides that a motion for reconsideration only should be granted if the movant demonstrates that the Court and the parties have been misled by a palpable defect and that a different disposition of the case must result from a correction of such a palpable defect. E.D. Mich. LR 7.1(g). A motion that merely presents the same issues already ruled upon by the Court shall not be granted. Id.

Argument and Analysis

Plaintiffs contend that the Court committed several errors in denying their motion for relief from judgment. First, Plaintiffs maintain that the Court failed to consider all the newly discovered evidence presented in their pleadings in support of their Rule 60(b)(2) motion. Second, Plaintiffs argue that the Court erred in

concluding that they could have obtained affidavits from current Mancini Drive workers previously and therefore did not exercise due diligence in obtaining the information contained in Plaintiff Matthew Burdo's affidavit. Lastly, Plaintiffs argue that the Court "fundamentally misapprehends the claims made by Plaintiffs regarding the Mancini Drive Plant and the import of the newly discovered evidence."

Whether the Court ignored evidence presented in Plaintiffs' Rule 60(b)(2) motion

Plaintiffs argue that the Court ignored evidence submitted in support of their Rule 60(b)(2) motion. Plaintiffs first point to their exhibits showing that work performed at the Mt. Vernon, Ohio facility- which TRW claimed in their response brief was being moved to the newly expanded Mancini Drive facility- was not module work, as TRW claimed. Plaintiffs argue that, even if it was module work, non-module (i.e. manufacturing) work also was being performed at the Mt. Vernon facility and therefore this evidence undermines TRW's assertion that it could not put module work at the Van Dyke Plant where Plaintiffs previously were employed in order to increase the amount of the facility being utilized. Second, Plaintiffs assert that the Court ignored evidence which they claim undermines the credibility of TRW's assertion that it was neither building nor having anyone else build the facility across from the existing Mancini Drive facility.

Although the Court did not specifically discuss all of the "new" evidence presented in Plaintiffs' pleadings in support of their Rule 60(b)(2) motion, the Court did not ignore the evidence in deciding the motion. The Court

simply found that the evidence did not impact its ruling. With respect to Plaintiffs' evidence regarding the work moved from the Mt. Vernon facility to the Mancini Drive facility, the Mt. Vernon facility is a KelseyHayes facility, not a TRW facility. Additionally, there is no indication of when it was decided that this work would be moved to the Mancini Drive facility. Therefore the Court cannot conclude that, when the decision was made to close the Van Dyke Plant, placement of this work at the plant should have been considered as a means of utilizing more of its floor space. Moreover, the fact that the Mt. Vernon facility may have accommodated module and non-module work does not undermine TRW's judgment that the infrastructure of the Van Dyke Plant (i.e. an insufficient number of shipping docks and roads providing ingress and egress) did not support placement of the DaimlerChrysler module work there.

As to Plaintiffs' evidence that the facility being built across the road from the Mancini Drive facility was being built for or by TRW, the Court assumed this to be true but nevertheless could not conclude that this evidence "clearly would have produced a different result if presented before the original judgment." Such evidence does not demonstrate that TRW obtained additional work that was suitable for placement at the Van Dyke Plant to make sufficient use of its space. It in no way suggests that TRW moved or plans to move the work that Plaintiffs' performed to the Mancini Drive facility or the facility being built across the street or that either facility was a "disguised continuance" of the Van Dyke Plant. The manufacturing work Plaintiffs previously performed at the Van Dyke Plant was moved to an existing manufacturing plant within the

suspension group which is located in Canada.

Whether the Court erred in concluding that Plaintiffs failed to exercise due diligence

In its April 30, 2008 opinion and order, the Court stated the following in discussing whether Plaintiffs exercised due diligence in obtaining the "new" evidence submitted in support of their Rule 60(b)(2) motion:

> ... Plaintiffs could have obtained information from employees working at the Mancini Drive facility as to the specific work being performed at the plant and provided the Court with affidavits from those employees (if in fact the information supported Plaintiffs' belief).

(Doc. 79 at 5-6.) Plaintiffs assert that this conclusion was in error because it "does not address the fact that the names of the people in the current workforce at Mancini Drive are unknown to plaintiffs; there is no reason why such employees would cooperate with plaintiffs who are in fact seeking their jobs, . . ." (Br. in Supp. Mot. at 2.) Plaintiffs assert that "[i]t is impossible for the Court to credibly believe that such employees would have cooperated with plaintiffs." (Id.)

As an initial matter, the Court is left to wonder why Plaintiffs believe that they could not have obtained access to and cooperation from Mancini Drive employees to inquire about the type of work performed at their facility. Mr. Burdo's affidavit, which was attached to Plaintiffs' Rule 60(b)(2) motion, demonstrates that nothing prevented Plaintiffs from entering the Mancini Drive parking lot and talking to workers as they entered or exited the facility.

Moreover, it does not appear from Mr. Burdo's affidavit that he had any trouble getting one Mancini Drive employee to speak with him and Plaintiffs cannot claim that the Mancini Drive employees would be unwilling to sign an affidavit, as it does not appear that they even tried to obtain such an affidavit. In any event, the Court's statement was made only to provide one example of the means by which it believed Plaintiffs previously could have discovered what work was being performed at the Mancini Drive facility and what the future plans were for the facility. Clearly there were other means by which Plaintiffs could have obtained this information (e.g. submitting an interrogatory to TRW). Thus the Court does not find any error in its conclusion that Plaintiffs failed to exercise due diligence in obtaining the "new" evidence presented in support of their Rule 60(b)(2) motion.

Whether the Court "fundamentally misapprehend[ed]" Plaintiffs' claims regarding the Mancini Drive Plant being an alter ego plant and the import of the newly discovered evidence

Plaintiffs lastly maintain that the Court misunderstood their claims regarding the Mancini Drive facility being an alter ego operation of the Van Dyke Plant and the relevance of the "new" evidence with respect to that issue. The Court believes that it understood Plaintiffs alter ego argument when it previously addressed that argument. Plaintiffs' pending motion simply makes the same arguments with respect to that issue that the Court already considered in deciding TRW's motion for summary judgment, Plaintiffs' November 7, 2007 motion for reconsideration, and Plaintiffs' Rule 60(b)(2) motion. For the reasons set forth in the Court's prior

opinions and orders, it continues to reject Plaintiffs' alter ego theory.

Conclusion

For the reasons set forth above, the Court concludes that it did not commit a palpable error in deciding Plaintiffs' Rule 60(b)(2) motion, the correction of which would result in a different disposition of this matter.

Accordingly,

IT IS ORDERED, that Plaintiffs' Motion for Reconsideration is DENIED.

Footnote

Fn1On May 30, 2008, Plaintiffs filed a notice of appeal with respect to the Court's April 30, 2008 decision. (Doc. 83.)

Filed 4/30/2008
Case No. 06-14276

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JERRY CRAWFORD, CHARLES ANNABEL DARRYL BALLARD, MATTHEW BURDO, DON HOSKINS, ROY LANNING, PETER "LARRY" POWELL, WANDA SIMPSON, and DANIEL SLANE, Plaintiffs,

v.

TRW AUTOMOTIVE U.S. LLC, Defendant.

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT BASED ON NEWLY DISCOVERED EVIDENCE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)(2)

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on April 30, 2008.

PRESENT: THE HONORABLE PATRICK J. DUGGAN U.S. DISTRICT COURT JUDGE

Plaintiffs initiated this lawsuit after their former employer, Defendant TRW Automotive U.S. LLC ("TRW"), closed the manufacturing and assembly plant where they worked. TRW subsequently filed a motion for summary judgment, which this Court granted in an

opinion and order entered on October 24, 2007. The Court entered a judgment in favor of TRW and against Plaintiffs on the same date. An amended judgment was entered on November 16, 2007. Plaintiffs thereafter filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e), which this Court denied on December 28, 2007. On January 24, 2008, Plaintiffs filed a notice of appeal. Presently before the Court is Plaintiffs' motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(2), filed March 5, 2008. The motion has been fully briefed. For the reasons that follow, the Court denies the motion.

Standard of Review

Pursuant to Federal Rule of Civil Procedure 60(b)(2), a court may relieve a party from a final judgment or order if there is "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." FED. R. CIV. P. 60(b)(2). "[T]o prevail on a Rule 60(b)(2) motion, a movant must demonstrate: (1) that it exercised due diligence in obtaining the information and (2) the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment." Good v. Ohio Edison Co., 149 F.3d 413, 423 (6th Cir. 1998). The movant also must demonstrate that the newly discovered evidence is admissible. Rhoden v. Campbell, No. 98-6298, at *3 (6th Cir. Dec. 10, 1999) (unpublished op.); see also Wilson v. Upjohn Co., 808 F. Supp. 1321, 1323 (S.D. Ohio 1992).

Argument

Plaintiffs rely on the affidavit of Plaintiff Matthew

Burdo to support their Rule 60(b) motion. In his affidavit, Mr. Burdo indicates that on February 21, 2008, he was in the area of the Mancini Drive facility and decided to drive past the plant. (Pls.' Mot. Ex. 1 Pars. 4-5.) Mr. Burdo further states that he had visited the facility right after it was opened and it now looked bigger. (Id. Par. 6.) Mr. Burdo drove into the parking lot of the Mancini Drive facility and pulled up to a car where a man was eating a sandwich. (Id. Par. 5.) According to Mr. Burdo, the man- identified only as "Dave"- said that "they" just built an addition onto the original plan and have a Ford F-150 job running. (Id. Par. 9.) Mr. Burdo provides that the man also told him that "they" are getting "the Ford Mustang job" in the Spring and are putting an addition on across the street. (Id. Pars. 10-11.) Mr. Burdo states that he then witnessed what appeared to be the first stages of construction of a facility across the street from the Mancini Drive facility. He further attests that "because we had Ford F150 and Mustang jobs at the [Van Dyke] plant ... it appeared they were bringing our work back but putting it in the Mancini Drive plant. . ." (Id. Par. 12.)

In support of their motion, Plaintiffs also submit a permit for "Sterling Properties MI, LLC" ("Sterling Properties") to expand the Mancini Drive facility by 15,000 square feet, dated September 6, 2007, which Plaintiffs obtained after Mr. Burdo visited the facility. (Pls.' Mot. Ex. 2.) In a supplemental reply brief, Plaintiffs also present evidence which they obtained via a recent FOIA request that reveals a relationship between the owner of the Mancini Drive facility and the property being developed across the street. (Pls.' Supp. Reply Br. at 2, Exs. 1-3.)

In their motion, Plaintiffs argue that this "newly discovered evidence" shows that TRW:

> (i) has significantly expanded the Mancini Drive plant to accommodate work on the Ford F-150; (ii) has begun construction on an additional facility to the Mancini Drive facility to accommodate another job on the Ford Mustang; (iii) that the work in and slated to be placed in the expansions of the Mancini Drive plant, upon information and belief, includes work on ball joints which had previously been performed by plaintiffs at the Van Dyke plant.

(Pls.' Mot. at 3.) Plaintiffs maintain that this evidence is material and controlling because it would have impacted the Court's analysis regarding whether TRW's stated reasons for placing module work at the Mancini Drive facility instead of the Van Dyke plant where they worked was pretextual. Plaintiffs also maintain that this evidence is material and controlling with respect to the Court's analysis of whether TRW opened the Mancini Drive facility as an alter ego of the Van Dyke plant. In summary, Plaintiffs contend that this newly discovered evidence shows that, while the parties were briefing TRW's summary judgment motion, TRW "was in the process of expending significant resources to expand the Mancini Drive facility to accommodate new work, and, on information and belief, this new work is the very type of manufacturing work that plaintiffs had been performing at the Van Dyke plant." (Pls.' Br. in Supp. of Mot. at 1.)

As to whether they exercised due diligence in obtaining the above information, Plaintiffs first make the following assertion:

> Because of defendant's posture in the court that the Mancini Drive plant was built only to accommodate the five year module contract from Chrysler, plaintiffs and their attorneys were directed away from seeking evidence of defendant's intention to significantly expand the Mancini Drive facility and put new work of a non-module nature into [the] plant.

(Id. at 3.) Plaintiffs further maintain that they could not have discovered this information earlier because the internal operations of the facility are not readily observable from outside the facility and because the facility is not located off of a main street and is not visible from any main thoroughfare within the area. (Id. at 4.)

In response to Plaintiffs' motion, TRW argues that, except for evidence that the Mancini Drive facility was expanded a modest amount, Plaintiffs' alleged "newly discovered evidence" is inadmissible hearsay. Additionally, TRW argues that Plaintiffs have no evidence regarding the cause of the expansion or what type of work is being performed in the Mancini Drive facility; rather, Plaintiffs only speculate that the work performed or that will be performed is the same manufacturing work that they previously performed at the Van Dyke plant. Lastly, TRW argues that, even if the Court were to consider Plaintiffs' evidence, the evidence does not produce a different result in this case.

Analysis

The Court concludes that Plaintiffs have not satisfied their burden under Rule 60(b)(2). First, the Court finds that Plaintiffs fail to demonstrate that they exercised due diligence in obtaining the "new" evidence. Plaintiffs do not identify any obstacle to their ability to view the Mancini Drive facility or discover information about its internal operations prior to February 21, 2008. While Plaintiffs state that the facility is not located on a main street and is not visible from a main thoroughfare, there is no indication that the road on which it is located is private and/or closed to traffic. Plaintiffs further state that the facility's internal operations are not readily observable by anyone other than TRW's management and employees. The Court believes, however, that there were means by which Plaintiffs previously could have discovered what work was being performed at the Mancini Drive facility. For example, Plaintiffs could have obtained information from employees working at the Mancini Drive facility as to the specific work being performed at the plant and provided the Court with affidavits from those employees (if in fact the information supported Plaintiffs' belief). In any event, even if the Court were to find that Plaintiffs acted diligently, it finds that most of their "new" information is not admissible evidence and that the evidence that is admissible is not material and controlling and would not have produced a different result if presented before the original judgment.

The Court finds only the following "new" information to be admissible evidence: (1) Mr. Burdo's observations that the Mancini Drive facility appeared bigger than

when it opened; (2) his observations of what appeared to be the first stages of construction of a facility across the street from the Mancini Drive facility; (3) that Sterling Properties applied for and was issued a 15,000 expansion permit for the Mancini Drive facility in 2007; and (4) that related entities or the same entity own the Mancini Drive facility and the facility being constructed across the street. The Court cannot conclude that this evidence "clearly would have produced a different result if presented before the original judgment." It does not demonstrate that the work Plaintiffs performed at the Van Dyke plant has been or is going to be moved to the Mancini Drive facility or the facility being built across the street. It also does not demonstrate that TRW had or subsequently obtained additional work that could have been placed at the Van Dyke plant to make sufficient use of the plant's 300,000 plus square feet.fn1 Finally, this evidence has no impact on the Court's finding that the Mancini Drive facility was not an alter ego operation of the Van Dyke plant.

The Court disagrees with Plaintiffs that "Dave's" statements to Mr. Burdo on February 21, 2008 constitute admissions of a party-opponent that are admissible under Federal Rule of Evidence 801(d)(2). Pursuant to Rule 801(d)(2), an employee's statements do not constitute hearsay and are admissible only if the statements concern a matter within the scope of the individual's employment. FED. R. EVID. 801(d)(2)(D) (providing that a statement is not hearsay if it is "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship"); see also Jacklyn v. Schering-Plough Healthcare Products Sales Corp., 176 F.3d 921, 928 (6th Cir. 1999) (recognizing "a critical

difference between making a statement while one is an employee and having the actual or implied authority to make such a statement on behalf of your employer.") According to Mr. Burdo's affidavit, when Dave allegedly made the statements, he was eating a sandwich while sitting in a car in the Mancini Drive facility's parking lot. Moreover, Plaintiffs only assume that Dave is a TRW employee. Nothing in Mr. Burdo's affidavit indicates that such information was conveyed to him.

For the above reasons, the Court holds that Plaintiffs fail to satisfy their burden under Rule 60(b)(2).

Accordingly,

IT IS ORDERED, that Plaintiffs' Motion for Relief from Judgment Based on Newly Discovered Evidence Pursuant to Federal Rule of Civil Procedure 60(b)(2) is DENIED.

Footnote

Fn1With a 15,000 square foot expansion, the Mancini Drive facility now appears to be 85,000 square feet. (See Pls.' Mot. Ex. 2; 10/24/07 Op. and Order at 5 (finding that the facility originally was 70,000 square feet).) Plaintiffs present no evidence with regard to the square footage of the facility being constructed across the street from the Mancini Drive facility. When TRW decided to close the Van Dyke plant, only 30,000 square feet of the plant's over 300,000 square feet of production capacity was being utilized. (Id. at 14-15.) Thus- assuming that all 85,000 square feet of the expanded Mancini Drive facility is being utilized- at most

Plaintiffs show that a little over a quarter of the Van Dyke plant (115,000 of its over 300,000 square feet) would have been utilized if the work placed in the Mancini Drive facility instead had been located there.

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No. 09-494

Supreme Court, U.S.
FILED
NOV 25 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JERRY CRAWFORD, CHARLES ANNABEL, DARRYL BALLARD, MATTHEW BURDO, DON HOSKINS, ROY LANNING, PETER POWELL, WANDA SIMPSON, DANIEL SLANE,
Petitioners,

v.

TRW AUTOMOTIVE U.S. LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

ROBERT M. VERCRUYSSE
Counsel of Record
WILLIAM E. ALTMAN
VERCRUYSSE MURRAY & CALZONE, P.C.
31780 Telegraph Road
Suite 200
Bingham Farms, MI 48025
(248) 540-8019

Counsel for Respondent TRW Automotive U.S. LLC

November 25, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether this Court should review its holding in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry*, 520 U.S. 515 (1997) where Petitioners prevailed on their argument that ERISA § 510 of the Employee Retirement Income Security Act (ERISA) applies to plant closing cases and where both courts followed *Inter-Modal Rail*.

2. Whether this Court should address Petitioners' request to apply a mixed motive analysis to ERISA § 510, claims where Petitioners never argued before the lower courts that such an analysis should be applied and where the facts of this case do not suggest a mixed motive.

3. Whether this Court should address whether alter-ego concepts should be applied to ERISA § 510 cases to impose collectively bargained obligations negotiated for a single site of an employer to other non-unionized sites of the same employer.

4. Whether this Court should address remedies for ERISA § 510 violations where the lower courts found no ERISA § 510 liability and where the lower courts did not reach the issue of remedies.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption. Petitioners do not include the class[1] certified by the district court.

Respondent TRW Automotive U.S. LLC is an indirect subsidiary of TRW Automotive Holdings Corp which is publicly traded. (NYSE: TRW)

[1] On March 31, 2007, the district court certified a class action, with the Petitioners as the class representatives. After summary judgment was entered against the class by the district court, the class unsuccessfully appealed to the court of appeals. The class, however, has not been designated as a party to Petitioners' petition.

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STATEMENT OF THE CASE

The named Petitioners are nine former employees of Defendant TRW Automotive U.S. LLC's ("TRW") Van Dyke Road manufacturing plant in Sterling Heights, Michigan ("Van Dyke Plant"). Production employees employed at this plant were represented by the United Autoworkers Union (UAW). TRW and UAW Local 247 were parties to a collective bargaining agreement ("CBA") that covered the terms and conditions of employment of bargaining unit members employed at the Van Dyke Plant. The UAW and TRW also negotiated a defined benefit pension plan for the benefit of Van Dyke Plant bargaining unit employees (TRW Automotive Sterling Plant Pension Plan) (the "pension plan"). (R.34 Exhibits to MSJ, Ex. 1 – relevant portions of pension plan, Sealed ROA pp. 563-572)

Under the Van Dyke Plant pension plan, employees who retired from active service with 30 or more years of benefit service at the Van Dyke Plant were entitled to an early retirement benefit as defined by the plan. (R.34 Exhibits to MSJ, Ex. 1 - 5.2(b) of plan, Sealed ROA p. 567) Employees retiring with 30 or more years of benefit service received a pension supplement and retiree medical coverage. (R.34 Exhibits to MSJ, Ex. 1 - Pension Plan Section 6.2(c), Sealed ROA pp. 569-570, and Ex. 2 – CBA section 32.1.4, Sealed ROA p. 576). There was also an early retirement benefit under the pension plan for employees who retire from active service on or after age 55 and with 10 or more years of service. (R.34 Exhibits to MSJ, Ex. 1 - 5.2(a) of plan, Sealed ROA p. 567) Employees age 55 with 10 or more years of benefit service received retiree medical coverage. (R.34 Exhibits to MSJ, Ex. 2 - CBA 32.1.4,

Sealed ROA p. 576) Under the terms of the pension plan and CBA, benefit service may only be earned at the Van Dyke Plant. (R.34 Exhibits to MSJ, Ex. 1 – 1.1(j), Sealed ROA pp. 564-565) Generally, benefit service is earned for each year in which the employee is paid for services performed and during certain periods of leaves of absence.

The Van Dyke Plant

By 2004, TRW was faced with significant overcapacity within the suspension division of its North American Braking & Suspension group, which included the Van Dyke Plant. TRW was unable to generate sufficient business, caused in part by the loss of market share by the Van Dyke Plant's largest customers (Ford and DaimlerChrysler) and increased international competition. (R.34 Exhibits to MSJ, Ex. 9 – Sterling (Van Dyke) Business Review - Bates No. 6854, 6857, Sealed ROA pp. 592-594) At the same time, TRW was experiencing the same overcapacity problem in other product lines within the North American Braking & Suspension group. As a result, TRW determined it needed to reduce the number of manufacturing facilities in North America. (R.34 Exhibits to MSJ, Ex. 10 - Bates No. 5081, Sealed ROA p. 596)

By 2004 the vast majority of the Van Dyke Plant manufacturing space was unused. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 90, ROA p. 607) Indeed, of the over 300,000 square feet of production capacity, the sales profile showed that only 30,000 square feet (10% of capacity) would be utilized. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 43, Sealed ROA p. 600; Ex. 9 - Bates 6857, Sealed ROA p. 594) As a result of the

overcapacity, the overhead costs of such a large plant were prohibitive. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 90, Sealed ROA p. 607) Due to the unused capacity, fixed costs of the Van Dyke Plant accounted for 26% of every sales dollar; an acceptable fixed cost percentage would have been between 10-15%. (R.34 Exhibits to MSJ, Ex. 9 - Bates No. 6857, Sealed ROA p. 594)

In approximately September 2004, TRW's North American Braking & Suspension group formulated a restructuring plan in which it analyzed the costs and benefits of shutting down several facilities in North America, including the Van Dyke Plant. (R.34 Exhibits to MSJ, Ex. 10 - Bates No. 5082, Sealed ROA p. 597) The plan was studied and refined until August 2005 when TRW eventually announced its intention to close the Van Dyke Plant. (R.34 Exhibits to MSJ, Ex. 14 - Bates No. 4457, Sealed ROA p. 619) Consistent with its obligations under federal labor law, TRW negotiated with UAW Local 247 regarding the decision to close the Van Dyke Plant and the effects of the closure. (R.34 Exhibits to MSJ, Ex. 15 - Osborne 9, Sealed ROA p. 620) The Van Dyke Plant was eventually closed on January 26, 2007.

The Mancini Drive Facility

Meanwhile, in late 2003, DaimlerChrysler contacted TRW and asked it to bid on module assembly work for four North American DaimlerChrysler plants – one in Ontario, one in Mexico, one in Missouri, and one in Sterling Heights, Michigan. The "module" work entailed TRW scheduling receipt of component parts from other manufacturers selected by DaimlerChrysler, assembling them into various

modules,[2] sequencing them for ready assembly into vehicles, and (in some cases) transporting the modules to the DaimlerChrysler assembly plant. (R.34 Exhibits to MSJ, Ex. 11 – Hoover 46-47, Sealed ROA p. 603-604; Ex. 17 - Bates No. 2951, Sealed ROA p. 657; Ex. 18 - Weiss 111, Sealed ROA p. 678) This business model was far different than the work previously performed at the Van Dyke Plant, which entailed the actual manufacture of components by TRW. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 46-47, Sealed ROA pp. 603-604) In the case of module work, TRW would merely acquire and assemble components manufactured by other suppliers chosen by its customer. (R.34 Exhibits to MSJ, Ex. 17 - Bates No. 2951, 2958, Sealed ROA p. 657, 664) The module work involved no manufacturing whatsoever by TRW. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 46-47, Sealed ROA pp. 603-604; Ex. 18 - Weiss 111, Sealed ROA p. 678)

DaimlerChrysler required the successful bidder to fully assemble each module to individual specifications and to sequence them in order so that they would be ready for assembly into a vehicle, within 60-90 minutes. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 46, Sealed ROA p. 603; Ex. 17 – Bates No. 2951, Sealed ROA p. 657) The module assembly facility would require approximately 70,000 square feet of floor space with at least 10 shipping bays adjacent to the assembly

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[2] Depending on the program being supported at the various module assembly plants, the modules included front suspension modules (including power steering components and brake components); rear suspension modules (including brake components); front strut modules; and rear shock modules. (R.34 Exhibits to MSJ, Ex. 16 - Launch Readiness Review – Bates Nos. 6797-6820, Sealed ROA pp. 625-648; Ex. 17 Launch Readiness Review – Bates Nos. 2943 – 2968, Sealed ROA pp. 649-674)

lines. (R.34 Exhibits to MSJ, Ex. 16 - Bates No. 6798, Sealed ROA p. 626; Ex. 11 - Hoover 43, Sealed ROA p. 600; Ex. 20 - Muckley 196, Sealed ROA p. 684) Moreover, the module work was to be done at a very low profit margin. (R.34 Exhibits to MSJ, Ex. 21 - Bates No. 6408, Sealed ROA p. 685)

With respect to supplying the Sterling Heights, Michigan facility, DaimlerChrysler initially suggested that TRW prepare its bid using the existing Van Dyke Plant as the location for performing the module work.[3] (R.34 Exhibits to MSJ, Ex. 11 - Hoover 39, Sealed ROA p. 599) However, TRW ultimately determined the Van Dyke Plant was not suitable for the module assembly work for several reasons, including insufficient ingress and egress, excess size resulting in burdensome overhead costs, excessive labor costs under the Van Dyke CBA especially in view of the unskilled nature of the module work, and the limited duration of the contract with DaimlerChrysler. (R.34 Exhibits to MSJ, Ex. 20 - Muckley 182 -183, 196, Sealed ROA pp.682-683, 684; Ex. 11 - Hoover 43-44, Sealed ROA pp. 600-604)

DaimlerChrysler ultimately awarded the module work for all four facilities to TRW Automotive Holdings Corp.'s Kelsey-Hayes Company subsidiary. DaimlerChrysler issued its first purchase order in February 2005 to supply module assemblies for a five-year period. (R.34 Exhibits to MSJ, Ex. 20 - Muckley

[3] Contrary to the unsupported arguments in Petitioners' brief, TRW never originally planned to place the module work at the Van Dyke Plant.

156, Sealed ROA p. 681) Kelsey-Hayes Company,[4] in turn, leased a new 70,000 square foot assembly facility at 42315 Mancini Drive in Sterling Heights, Michigan (Mancini Drive facility). (R.34 Exhibits to MSJ, Ex. 11 - Hoover 44-45, Sealed ROA pp. 601-602) In August 2006, Kelsey-Hayes Company began regular production of module assemblies at its Mancini Drive facility. Regular, full time employees at the Mancini Drive Plant are employed by Kelsey-Hayes Company, rather than Defendant. Employees at the Mancini Drive Plant are not represented by a union, and they do not have a defined-benefit pension plan or retiree medical benefits. (R.34 Exhibits to MSJ, Ex. 23 - Bates No. 6784, Sealed ROA pp. 688-689).

Notably, the manufacturing work performed by the named Petitioners was not transferred to or performed at the Mancini Drive Plant. (R.34 Exhibits to MSJ, Ex. 22 - Bates 6874, Sealed ROA pp. 686-687) Further, the vast majority of the salaried workforce at the Van Dyke Plant was not transferred to Mancini Drive. Only five salaried personnel from the Van Dyke Plant worked at the Mancini Drive facility. (R.34 Exhibits to MSJ, Ex. 18 – Weiss 57, Sealed ROA p. 676)

Negotiations With The UAW

The uncontradicted deposition testimony establishes that the decision to close the Van Dyke Plant and the decision to place the module work at the Mancini Drive facility were completely independent decisions. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 55,

[4] TRW Automotive U.S. LLC and Kelsey-Hayes Company are both indirect subsidiaries of TRW Automotive Holdings Corp., which is not a party to this litigation.

Sealed ROA p. 605) It is further uncontradicted that – even though the decisions were separate -- TRW negotiated with UAW Local 247 regarding potential preferential hiring rights for Van Dyke Plant employees at the Mancini Drive facility. (R.34 Exhibits to MSJ, Ex. 13 - Stuglin 18, 19, Sealed ROA pp. 615-616; Ex. 15 - Osborne 21, Sealed ROA p. 621). During closure negotiations, TRW also negotiated over the union's request to grant additional pension credits to Van Dyke Plant employees. (R.34 Exhibits to MSJ, Ex. 13 – Stuglin 22–23, Sealed ROA pp. 617-618)

The union committee was unwilling, however, to compromise on items TRW requested in exchange for the additional benefits the union sought. (R.34 Exhibits to MSJ, Ex. 15 - Osborne 43, Sealed ROA p. 622) With no concessions from the union, TRW calculated that closing the Van Dyke Plant would cost it in excess of $15 million. This included $9.7 million in "curtailment costs" – the net additional pension and retiree medical costs TRW would have to immediately recognize under the accounting rules due to the closure. (R.34 Exhibits to MSJ, Ex. 24 - Kiwicz 33, Sealed ROA 690; Ex. 25 - Bates Nos. 7743-7744, Sealed ROA pp. 691-693)

Meanwhile, TRW continued to perform the remaining work at the Van Dyke Plant consistent with the terms of the CBA. As was the practice since at least the 1980s, TRW employees worked overtime. (R.34 Exhibits to MSJ, Ex. 4 - Burdo 28, Sealed ROA p. 580; Ex. 11 - Hoover 94-95, Sealed ROA p. 608-609) Petitioners have produced no evidence that TRW scheduled any more overtime during the last months of production as compared with any prior periods. Indeed, Petitioner Burdo testified that TRW worked

extensive overtime as far back as the 1980s. (R.34 Exhibits to MSJ, Ex. 4 - Burdo 63, Sealed ROA p. 581) Further, it is undisputed that, under the terms of the Van Dyke Plant CBA, all overtime was voluntary. TRW therefore had no authority to require anyone to work overtime. (R.34 Exhibits to MSJ, Ex. 15 - Osborne 50-51, Sealed ROA pp. 623-624)

TRW maintained its planned employee headcount and costs throughout the plant closing process. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 94-95, Sealed ROA pp. 608-609) Depending on each worker's job category, some worked more overtime between 2003 and the announced plant closing date and some worked less: Petitioner Hoskin testified that between 2003 and 2005, the amount of overtime he worked decreased. (R.34 Exhibits to MSJ, Ex. 7 - Hoskin 20, Sealed ROA p. 590) As needs arose, TRW recalled Van Dyke Plant employees from layoff by order of seniority under the CBA to complete final work before the plant closing. (R.34 Exhibits to MSJ, Ex. 18 - Weiss 91, Sealed ROA p. 677) Indeed, after it announced its intent to close the Van Dyke Plant, TRW recalled Joseph Horton and Heidi Blankenship from layoff and, because of their return to work, the two employees accrued 30 years of pension credit. (R.34 Exhibits to MSJ, Ex. 12 - Hughes 157, Sealed ROA p. 612; Ex. 26 - service credit chart, Sealed ROA pp. 694-701)

At the time TRW announced its intention to close the Van Dyke Plant in August 2005, there were approximately 77 bargaining unit members who were eligible to retire with 30 years of credited service. (R.34 Exhibits to MSJ, Ex. 27 - Bates No. 4268, Sealed ROA p. 702) An additional 20 bargaining unit members were eligible to retire at age 55 with ten

years of service. *Id.* Meanwhile, between the end of 2003 and the closing of the Van Dyke Plant, 13 more bargaining unit members earned sufficient additional pension service credit to achieve 30 years of pension service credit. *Id.* During that same time period, 97 bargaining unit members retired with 30 years of pension service credit. (R.34 Exhibits to MSJ, Ex. 26 – Service credit chart, Sealed ROA pp. 694-701).

By the time of the actual closing of the Van Dyke Plant, only three bargaining unit members missed a 30 year retirement by less than one year of benefit service and an additional four bargaining unit members (for a total of 7) missed a 30 year retirement benefit by fewer than two years of benefit service. *Id.* Of the 102 individuals encompassed by the class certified by the district court, only 11 workers needed less than five additional years of benefit service in order to achieve 30 years of benefit service. *Id.* All other potential class members – 91 in total -- needed to work at least an additional five years in order to achieve 30 years of credited service. *Id.* Indeed, the Class certified by the district court includes *39* bargaining unit members who needed more than 20 years of additional benefit service to achieve 30 years of benefit service. *Id.*

Petitioners' Claims

Petitioners' Amended Complaint alleges that Defendant violated ERISA § 510 of the Employee Retirement Income Security Act, 29 U.S.C. §1140, ("ERISA") by: (1) failing to "recall the Plaintiffs to work following a layoff for the specific purpose of preventing them from establishing eligibility for their 30 year service pension and obtaining their company paid for medical and health insurance;" and (2) "intentionally

clos[ing] the Van Dyke Plant for the purpose of preventing employees from maintaining and continuing to qualify for their pension and health benefits." On March 31, 2007, the district court certified a class on the basis of "whether TRW closed the Van Dyke Plant and refused to transfer employees to the Mancini Drive facility in order to interfere with the employees' ERISA benefits; and (2) whether such conduct constitutes a violation of Section 510 of ERISA." (R.33 SJ Motion, Ex. A – Order granting class certification, ROA pp. 82-95) Thus, Petitioners' claims before the district court consisted of a class claim that TRW unlawfully closed its Van Dyke Plant and refused to transfer Van Dyke Plant employees to the Mancini Drive facility and individual claims that TRW unlawfully failed to recall Van Dyke Plant employees from layoff. Petitioners are not seeking certiorari on behalf of the class certified by the district court. Rather, they seek certiorari on behalf of the named Petitioners only.

District court Proceedings

On October 24, 2007 the district court issued its Opinion and Order granting Summary Judgment (R.51, SJ Order, ROA pp. 198-216) and issued a separate Judgment. The Court held that although Petitioners presented a *prima facie* case under ERISA § 510 based on the closing of the Van Dyke Plant, TRW demonstrated legitimate non-discriminatory reasons for closing the Van Dyke Plant because the closure was part of an overall effort to consolidate facilities operations within the North American Braking & Suspension group. (R.51, SJ Order, p. 17, ROA p. 214) The district court held that while the cost of ERISA benefits was one factor that rendered the wage

structures within certain facilities uncompetitive, those were not the only costs. *Id.*

Addressing Petitioners' allegations that TRW failed to recall workers from layoff or transfer them to the Mancini Drive facility, the district court held that Petitioners failed to present any case where the statute was applied to such employment decisions. (R.51, SJ Order, p. 11, ROA p. 208) The district court held that Petitioners presented no evidence to suggest that TRW considered employees' eligibility for ERISA benefits when selecting whom to recall from layoff. *Id.* Likewise, the district court held that Petitioners could not pursue their ERISA § 510 claim based on a failure to transfer employees to the Mancini Drive facility because the CBA between TRW and the UAW provided that employees accrued benefit service hours only for work performed at the Van Dyke Plant. (R.51, SJ Order, p. 12, ROA p. 209) The district court rejected Petitioners' argument that the Mancini Drive facility was an "alter-ego" of the Van Dyke plant because the "alter-ego" theory had no application to the case. (R.51, SJ Order, p. 12, ROA p. 209)

Finally, the district court held that Petitioners failed to show that TRW's articulated reasons for closing the Van Dyke Plant were a pretext for intentional discrimination. (R.51, SJ Order, p. 12, ROA p. 209) The district court held that TRW established a legitimate non-discriminatory reason for its actions. (R.51, SJ Order, pp. 17-18, ROA pp. 214-215) The district court rejected Petitioners' arguments that TRW's decisions were more likely motivated by the desire to interfere with ERISA benefits and that TRW's proffered reasons were unworthy of credence. (R.51, SJ Order, pp. 17-18, ROA

pp. 214-215) The district court held that "[a]t most, Plaintiffs' proofs [regarding TRW's consideration of costs] demonstrate that TRW considered legacy costs as one, among several, factors in deciding to reduce the number of facilities in its North American Suspension group and in selecting which facilities to close." (R.51 SJ Order p. 18, ROA p. 215) The Court also rejected Petitioners' arguments that "overcapacity" was an explanation unworthy of credence.

Petitioners moved for reconsideration of the district court's Order pursuant to E.D. Mich. LR 7.1(g), which the district court denied. (R.61, Order denying reconsideration, ROA pp. 278-284) The district court reiterated its prior holding that Petitioners presented no evidence to suggest that TRW considered employees' eligibility for ERISA benefits when selecting whom to recall from layoff. (R.61, Order denying reconsideration, p.3, ROA p. 280) The district court also enumerated four separate reasons as to why Petitioners' "alter-ego" theory is inapplicable to this case. (R.61, Order denying reconsideration, p.4, ROA p. 281) Finally, the district court rejected Petitioners' argument that they need only show that the cost of retiree benefits was *a* factor, rather than a motivating factor in the employer's decision. (R.61, Order denying reconsideration, p.4, ROA p. 281)

On March 5, 2008, Petitioners filed a "Motion for Relief from Judgment Based on Newly Discovered Evidence Pursuant to Federal Rule of Civil Procedure 60(b)(2)," asking the Court to grant their motion so they could seek remand from the court of appeals so as to re-open discovery into whether former Van Dyke Plant work was being performed at the Mancini Drive facility. (R.67, Motion for Relief from Judgment, p. 4,

ROA p. 290) Petitioners' motion was based on (1) an affidavit of Petitioner Burdo who stated that he talked with an unidentified man eating a sandwich in the parking lot of the Mancini Drive facility and (2) documents showing that a building permit was issued in June 2007 to expand the Mancini Drive facility. (R.67, Motion for Relief from Judgment, p. 3, ROA p. 289; R.68, Exhibit 2, ROA pp. 313-315) The district court denied Petitioners' motion.

On May 14, 2008, Petitioners filed a motion for reconsideration of the district court's Order denying relief from judgment, reiterating the same arguments in its original motion for relief from judgment. (R.81, Motion for Reconsideration, ROA p. 500) Petitioners also submitted an additional affidavit from Petitioner Burdo which recounted more hearsay and Burdo's opinion that the equipment in the Mancini Drive facility was similar to the equipment in the Van Dyke Plant. (R.82, Burdo Affidavit, ROA p. 515-516) The district court denied Petitioners' motion for reconsideration on June 10, 2008, holding that there was no error in the prior ruling. (R.85, Order denying reconsideration, ROA p. 521). Petitioners did not appeal the district court's denial of the motion for reconsideration of the denial of their motion for relief from judgment.

Court of appeals proceedings

The court of appeals, applying the *McDonnel Douglas* burden shift paradigm, found that the Petitioner stated a *prima facie* case under ERISA § 510 on Petitioners' theory that TRW unlawfully closed the Van Dyke Plant. The court, however, found that Petitioners could not proceed on their theories of

liability based on a failure to recall Petitioners from layoff or transfer them to the Mancini Drive facility. The court found that the decisions to recall some employees and not others were not discriminatory because those decisions were based on seniority in accordance with the requirements of the CBA and at least two employees accrued enough pension credits to retire with benefits after being recalled. With regard to the failure to transfer Petitioners, the court found that the CBA under which their entitlement to benefits was to be determined provided no such rights.

The court of appeals found that TRW stated a legitimate non-discriminatory reason for closing its Van Dyke Plant: overcapacity. Further, the court found that Petitioners were unable to show that TRW's articulated reason for closing the Plant was a pretext for unlawful discrimination. Petitioners failed to present evidence that TRW targeted certain employee benefits or rights for interference.

The court of appeals also affirmed the district court's denial of Petitioners' motion for relief from judgment. Petitioners are not seeking certiorari on this ruling.

REASONS FOR DENYING THE WRIT

The Court should deny the petition for a writ of certiorari because this case does not present any of the circumstances upon which the Court grants certiorari. Under ordinary circumstances, the Supreme Court does not grant a petition for certiorari unless (1) there is conflict among the circuits, (2) the case is one of general importance, or (3) the lower courts' decisions are wrong in light of Supreme Court precedent. *See*

Hubbard v. U.S., 514 U.S. 695, 699 (1995) (granting the petition for certiorari when there was a split in the federal circuits); *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 672 (1998) (granting the petition for certiorari when considering the "manifest importance of the case"); *Spears v. U.S.*, 129 S. Ct. 840, 842 (2009) (granting the petition for certiorari where the Eighth Circuit's decision on remand conflicted with a recent Supreme Court decision on issue).

In this case there is no split among the circuits regarding any issue that was actually decided in this case; Petitioners cannot show any issue of general importance that was actually decided in this case; and Petitioners do not even contend that any decision of the lower courts was wrong in light of Supreme Court precedent. Moreover, Petitioners prevailed on one of the issues upon which they seek certiorari; one of the issues upon which they seek certiorari was never argued in the lower courts; and one of the issues upon which Petitioners seek certiorari was never reached by the lower courts. There is simply no basis on which the Supreme Court should grant the petition for certiorari.

I. This court has already held that ERISA § 510 protections apply to plant closing and adverse employment actions

Petitioners argue that this Court should reaffirm its unanimous decision in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry*, 520 U.S. 515 (1997). In this case, both the district court and the court of appeals followed *Inter-Modal* and rejected any attempt by Defendant to narrow its application. The court of appeals held that while "employers or

other plan sponsors are generally free under ERISA to adopt, modify or terminate pension benefit plans, . . . this discretion does not permit them to discharge employees or alter their plan rights to circumvent the provision of promised benefits." (court of appeals decision, p. 4)

Simply put, Petitioners are attempting to appeal an issue upon which they have already prevailed. As recognized by Justice Scalia, this Court has a "'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" below. *Bunting v. Mellen*, 541 U.S. 1019, 1022 (Scalia, J., dissenting).

To the extent Petitioners argue that this Court should hold that ERISA § 510 applies to recalls and transfers, Petitioners misrepresent the holding of the district court and mischaracterize the court of appeals holding. Both courts found that the facts of this case would not support such liability. The district court expressly held that ERISA § 510 reaches "an employer's policy of using layoffs to avoid employees' accrual of ERISA benefits." (R.61, Order denying reconsideration, p.3, ROA p. 280) The district court went on to hold, however, that "Plaintiffs presented no evidence to suggest that TRW considered employees' eligibility for ERISA benefits when selecting who to recall from layoff." *Id.*

While the court of appeals holding was less direct than that of the district court, any implication that transfers or recalls may not be actionable was negated by the court's holding that the facts in this case did not show discrimination. The court of appeals held that "TRW's decision to recall some employees and not others was not discriminatory because those decisions

under the CBA were seniority based, and at least two employees accrued enough pension credits to retire with benefits *after* being recalled. Finally, the employees' CBA provided that benefits accrued only at the Van Dyke plant, so plaintiffs also lacked plan rights to be recalled" to the Mancini Drive facility. (R.34 Exhibits to MSJ, Ex. 1 – 1.1(j), Sealed ROA pp. 564-565) Thus, neither court held that the failure to recall or transfer is never actionable under ERISA § 510, and both courts held that the facts of this case showed no discrimination. Petitioners' argument in favor of certiorari does not present the circumstances upon which this Court grants certiorari. Their petition should therefore be denied.

II. Petitioners' argument that a mixed motive analysis should apply was not argued below and is not supported by the facts of this case

Petitioners argue at length that the lower courts erroneously evaluated the evidence in this case and allocated the burdens of proof through the *McDonnell Douglas / Burdine* prism because, according to Petitioners, an illegal factor played a part in the decision. Petitioners, however, have never made this argument before. Indeed, every brief submitted by the Petitioners both at the district court and the court of appeals argued the application of *McDonnell Douglas* burden shifting to the facts of this case. Petitioners never argued that a different paradigm should apply.

It is well established that "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). While appellate courts are given the discretion to decide when to deviate from this general rule of waiver, *see*

Singleton, 428 U.S. at 121, "prudential considerations" articulated by the Supreme Court counsel against hearing new arguments for the first time on appeal absent limited circumstances. For example, in *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *See also, United States v. Ortiz*, 422 U.S. 891 (1975) (declining to address scope of search and seizure case where the issue was raised for the first time in the petition for certiorari.)

These "prudential considerations" are particularly applicable here because, contrary to Petitioners' arguments, this case is not – nor have Petitioners previously argued that it is – a mixed motive case. Petitioners now argue that a TRW Vice President's testimony that the "cost" of pensions was "one reason among several" for closing the Van Dyke Plant[5] is tantamount to evidence that an *illegal* factor was one reason among several for TRW's actions. (R.46 Exhibits to Plaintiffs' Response to MSJ, Ex. 28

[5] In asserting this argument, Petitioners also misrepresent the testimony of Bruce Hoover by arguing that he "admitted he considered the curtailment gains and losses" "in determining where to place the module business." Plaintiffs' appeal brief, p. 14. Hoover never testified as such. Rather, Hoover testified he did not see the curtailment presentation referenced at his deposition until "after the fact," and that he did not recall if he knew the curtailment costs when he was creating a business case for the module work. (R.46, Exhibits to Plaintiffs' Response to MSJ, Ex. 37, p. 47-48, Sealed ROA 533)

Muckley 152-153, Sealed ROA pp. 220-221) Actually, the evidence showed TRW had to recognize approximately $9.7 million in additional costs to close the Van Dyke Plant. (R.34 Exhibits to MSJ, Ex. 24 - Kiwicz 33, Sealed ROA 690; Ex. 25 - Bates Nos. 7743-7744, Sealed ROA pp. 691-693)

Petitioners' argument also fails to recognize that ERISA § 510 does not prohibit employers from considering the *cost* of ERISA benefits in making business decisions. In order for a plaintiff "to establish a *prima facie* case under ERISA § 510, however, he must demonstrate not only that he lost the opportunity to accrue new benefits, but also that [the defendant] had the specific intent of avoiding ERISA liability when it discharged him." *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1113 (6th Cir. 2001); *Smith v. Ameritech*, 129 F.3d 857, 865 (6th Cir. 1997). *See also, Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993) (affirming summary judgment on § 510 claim arising out of plant closing and holding that "measures designed to reduce costs in general that also result in an incidental reduction in benefit expenses do not suggest discriminatory intent. Instead, the employee must introduce evidence suggesting that the employer's decision was directed at ERISA rights in particular.") "Otherwise, every employee discharged by a company with an ERISA plan would have a claim under § 510." *Majewski*, 274 F.3d at 1113.

In the absence of direct evidence of such discriminatory intent, a "plaintiff can state a *prima facie* case by showing the existence of (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to

which the employee may become entitled." *Id.* A plaintiff also must show "a causal link between [ERISA] benefits and the adverse employment decision." *Smith,* 129 F.3d at 865. "In order to survive defendant's motion for summary judgment, plaintiff must come forward with evidence from which a reasonable [fact finder] could find that the defendant's desire to avoid [benefits] liability was a determining factor in plaintiff's discharge." *Id.*; *see also Majewski*, 274 F.3d at 1113.

The Sixth Circuit has expressly held that the fact that an employer considers the *cost* of ERISA benefits is insufficient to show intent or pretext.[6] *Humphreys v. Bellaire Corp.,* 966 F.2d 1037, 1044 (6th Cir. 1992); *Morabito v. Master Builders, Inc.*, No. 96-3898, 1997

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[6] Indeed, the Accounting Standards set forth by the Financial Accounting Standards Board required TRW to consider these costs. *See,* Statement of Financial Accounting Standards No. 88 (any curtailment loss shall be recognized in earnings when it is probable that a curtailment will occur and the amount is reasonably estimable. If the amount is a curtailment gain, it shall be recognized in earnings when the related employees terminate or the plans amendment is adopted).

Petitioners' arguments regarding "curtailment" costs actually militates against any inference of discriminatory intent. It is undisputed that TRW incurred $9.7 million in "curtailment *costs*" – the net additional pension and retiree medical costs TRW would have to immediately recognize under the accounting rules – because of the closing of the Van Dyke Plant. TRW would not have incurred those costs had the plant remained open. Likewise, Petitioners' arguments that TRW planned to offset the curtailment costs by curtailment gains at other plants does not show discriminatory intent. Under Petitioners' argument, TRW would have incurred an overall curtailment gain had the Van Dyke Plant not closed. TRW is in business to make gains, not losses. Thus, Petitioners' arguments not only defy the accounting standards, they defy logic.

WL 668955 at 3 (6th Cir. Oct. 27, 1997). As the court held in *Humphreys,* 966 F.2d at 1044, "it is obvious that benefit costs make up a large amount of the costs of an employee to a company, and the pension rights are a substantial component of benefit costs, but these undeniable propositions are not sufficient standing alone to prove the requisite intent by the path of pretext."

Petitioners do not argue and provide no authority for the proposition that costs of benefits equates to the accrual of ERISA benefits. The consideration of "costs" is hardly evidence that "[a] desire to avoid [benefits] liability was a determining factor." *Smith,* 129 F.3d at 865; *see also Majewski,* 274 F.3d at 1114. A mixed motive analysis is therefore inapplicable here, and the lower courts properly applied *McDonnell Douglas* burdens of proof to the facts of this case. The petition should therefore be denied.

III. Alter-ego concepts are inapplicable to this case

Petitioners argue that the district court erroneously found that the facts of this case did not support alter-ego liability and that the court of appeals found that application of the alter-ego theory would be irrelevant. "Alter-ego" is a National Labor Relations Act concept and, as such, it is "most commonly used in labor cases to bind a new employer that continues the operations of an old employer where the new employer is merely a disguised continuance of the old employer." *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006). The alter-ego theory is typically at issue when a *union* is attempting to enforce the terms of a CBA against a separate employer who it claims is really the

employer with whom it has a contract. In some limited contexts, courts have permitted beneficiaries of a plan to proceed in an ERISA claim *against a successor employer* under an alter-ego theory where the successor employer claims no affiliation with the beneficiaries' employer. Courts have not, as Petitioners suggest, given wholesale license to plaintiffs to use the alter-ego theory to manufacture liability under ERISA.

In this case, Petitioners are seeking to apply the alter-ego theory *between different facilities of the same employer*. Petitioners cite no case holding that the alter-ego theory is applicable in this context. Rather, the cases that Petitioners cite are either (1) National Labor Relations Board cases in which the Board seeks to enforce its orders against a company that is related to a company that went out of business or opened a new business, to avoid complying with a Board order, or (2) claims by beneficiaries where a company division was sold or "spun off" to another company. (*Ensley v. Ford Motor Co.*, No. 06-12845, 2007 WL 2029638 (E.D. Mich. July 10, 2007); *Yolton, at* 571)

The alter-ego concept clearly has no applicability here because there are not two purportedly independent employers involved. TRW has never attempted to avoid liability on the basis that the Mancini Drive facility is owned by a different subsidiary within TRW's controlled group. TRW and Kelsey-Hayes Company are wholly-owned subsidiaries of a common parent corporation that both operate facilities within the parent's North American Braking & Suspension group. These entities have never held themselves out or otherwise represented themselves as unrelated or unaffiliated companies. Also, an "alter-

ego" finding is *not* a finding of liability for anything in and of itself. Alter-ego is a means for a plaintiff to attach a finding of liability to another company that claims to be unrelated. Thus, the issue of alter-ego is not only moot, even if alter-ego principles were applicable here the facts of this case do not support liability based on an ERISA § 510 theory.

In evaluating alter-ego status, courts ask "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *Yolton*, 435 F.3d at 587. Here, the Van Dyke Plant and Mancini Drive facilities do not have substantially identical business purpose, operation, or equipment. The Van Dyke Plant manufactured ball joints, steering linkages, tie rods and related components. (R.34 Exhibits to MSJ, Ex. 3 - Crawford 6-7, Sealed ROA pp. 577-578; Ex. 4 - Burdo 13, Sealed ROA p. 579; Ex. 5 - Annabel 10-12, Sealed ROA pp. 582-584; Ex. 6 - Ballard 7-8, Sealed ROA pp. 585-586; Ex. 7 - Hoskin 6, Sealed ROA p. 588) The Mancini Drive facility acquires components from suppliers dictated by DaimlerChrysler and assembles them. (R.34 Exhibits to MSJ, Ex. 17 - Bates No. 2951, 2958, Sealed ROA p. 657, 664) TRW did not "continue the operations" of the Van Dyke Plant at the Mancini Drive facility. (R.85 Opinion and Order Denying Plaintiffs' Motion for Reconsideration, p. 4, ROA p. 524) Further, it is undisputed that the module work performed at Mancini Drive was never performed at the Van Dyke Plant;[7] the work performed at the Van Dyke Plant was

[7] Contrary to the allegations in Petitioners' brief, module work was never performed at the Van Dyke Plant. Rather, Petitioner Hoskins testified that he never "put together a modular [sic] unit";

not transferred to or performed at the Mancini Drive facility. Indeed, only five of 20 salaried personnel at Mancini Drive worked at the Van Dyke Plant work at the Mancini Drive facility. (R.34 Exhibits to MSJ, Ex. 18 – Weiss 57, Sealed ROA p. 676) Equally important, as held by the district court, TRW did not "disguise" its operations at the Mancini Drive facility in order to avoid its obligations at the Van Dyke Plant. (R.85 Opinion and Order Denying Plaintiffs' Motion for Reconsideration, p. 4, ROA p. 524) *See Trustees of Resilient Floor Decorators Ins Fund v. A & M Installations*, 395 F.3d 244, 248 (6th Cir. 2005) (declining to apply the alter-ego doctrine because there was no evidence that the employer "concealed its close relationship with [a related company] and because there is no indication that the [benefits fund] has not received the full benefit of its collective bargaining agreement with A & M.") Thus, the facts of this case do not support the alter-ego theory.

Petitioners have not and cannot show that the issue of "alter-ego" liability in this case raises a conflict in the circuits, an issue of general importance, or that the lower courts' decisions are wrong in light of Supreme Court precedent. The petition should therefore be denied.

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the Van Dyke Plant made parts and then sent them out for assembly elsewhere. (R.46, Exhibits to Plaintiffs' Response to MSJ, Ex. 32, pp. 23-24, Sealed ROA 372)

IV. Petitioners' arguments regarding a ERISA § 510 remedy were not reached by the lower courts

Petitioners argue that this Court should hold that a remedy exists for claims like those that Petitioners failed to establish in this case. Neither of the lower courts reached the issue of remedies because both courts found no basis for liability. It is the practice of the Supreme Court to decide cases on the grounds raised and considered in the court of appeals and included in the question on which certiorari was granted. *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 431 (2002); *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998). Although it is not precluded from doing so,[8] the Supreme Court will not, as a rule, consider questions that were not considered or decided by the courts below. *See, e.g., N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 164 (1975); *Ramsey v. Mine Workers*, 401 U.S. 302, 311-12 (1971); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 148 n. 2 (1970). For example, in *Ramsey*, a case involving an action by coal mine operators against a union for antitrust violations, the coal miners urged the U.S. Supreme Court to construe the Protective Wage Clause in the CBA as being an illegal bargain for which the Union is not exempt under the antitrust laws. *Ramsey*, 401 U.S. at 311-12. The Court, however, found "no reference to this aspect of the case in the opinions in the district court and the court of appeals;" thus, the Court was "unsure whether it was presented below and whether,

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[8] *See, e.g., Carlson v. Green*, 446 U.S. 14 (1980) (Although an issue had not been presented in either the district court or the Court of Appeals, the Supreme Court addressed it on its merits, where it was an important, recurring one that was properly raised in another petition for certiorari).

in any event, there is record support for it." *Id.* at 312. Accordingly, the Court deemed "it inappropriate to consider it in the first instance." *Id.*

Petitioners here cannot show exceptional circumstances to warrant this Court's review of an issue that neither of the lower courts in this case reached. Petitioners' request for a writ of certiorari on this issue never reached by the lower courts should therefore be denied.

CONCLUSION

For all of the forgoing reasons, TRW asks the Court to deny the writ.

Respectfully submitted,

VERCRUYSSE MURRAY & CALZONE, P.C.

Robert M. Vercruysse (P21810)
rvercruysse@vmclaw.com
William E. Altman (P52788)
waltman@vmclaw.com
Suite 200, 31780 Telegraph Road
Bingham Farms, MI 48025-3469
(248) 540-8019
Attorneys for Defendant

Dated: November 25, 2009

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(4)

Supreme Court, U.S.
FILED
DEC 7 - 2009
OFFICE OF THE CLERK

No. 09-494

IN THE

Supreme Court of the United States

JERRY CRAWFORD; CHARLES ANNABEL; DARRYL BALLARD; MATTHEW BURDO; DON HOSKINS, ROY LANNING; PETER POWELL, WANDA SIMPSON, DANIEL SLANE, PETITIONERS

v.

TRW AUTOMOTIVE U.S. LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

JEANNE MIRER
Counsel of Record

Eisner & Mirer P.C.
113 University Place,
8th Floor
New York, NY 10003
(212) 473-8700

CURRY & TAYLOR ♦ (202) 393-4141

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Petitioners are a class of workers who lost their jobs and their rights to accrue further pension benefits and other benefits when Respondent TRW closed its plant on Van Dyke Road in Sterling Heights Michigan in 2006. They claim the Respondent violated their rights under section 510 of ERISA because the decision to close the plant was made with the specific intent to interfere with their attainment of rights to which they would have been entitled had the plant not closed. Respondent claimed the decision to close Van Dyke was due to overcapacity, whereas Petitioners alleged that the claimed overcapacity was a pretext and that Respondents could have cured the overcapacity by placing a large module contract from Daimler Chrysler at the Van Dyke plant as originally planned instead of placing it at a newly built alter ego plant a few miles away on Mancini Drive. In its Opposition Brief, Respondent makes factual and legal arguments which require some limited reply.

Petitioners, therefore, reply to the facts and legal arguments stated by Respondent in its Opposition as follows.

I. REPLY TO FACTUAL INACCURACIES

A. In an attempt to claim that TRW never intended to place the module work from Daimler Chrysler (DCX) at the Van Dyke plant, (as if this fact would make a difference as to any of its later arguments) Respondent claims on page 5 of its Opposition that it was Daimler Chrysler (DCX) which initially suggested the module contract be placed at the Van Dyke Plant. There is no evidence from DCX in the record supporting this. What is clear from the record is

that the September 22, 2004 bid correspondence from Howard Puuri (TRW's Director of Customer Development) to Mr. Cody at DCX shows the assembly location of the module work to service DCX's Sterling Heights Assembly Plant, was TRW's Sterling Heights Plant at 34201 Van Dyke. (Exhibit 1,# *06428*).

Two days after this correspondence, i.e., September 24, 2004, the North American Braking & Suspension Restructuring Plan was unveiled which expressed a negative view towards employees with "heritage costs..." (Exhibit 2, *#05081*) and called for a reduction in the number of workers with these costs.

About one month after this restructuring plan(on October 27, 2004) Mr. Puuri submitted an updated bid letter to DCX which stated that the TRW module assembly work be done in Sterling Heights would be done at "an existing (Van Dyke) or leased plant." (Exhibit 3, *#06477)*

Thus, within a few weeks after adopting a restructuring plan which targeted heritage cost laden employees such as Petitioners, TRW gave itself the option to place the Sterling Heights for DCX work at either an "existing (Van Dyke) or a leased plant". Respondent does not claim DCX asked that it be changed.

B. Respondent claims that the decisions to put the module work at Mancini Drive and to close Van Dyke were separate decisions as if that fact was indicative of the lack of specific intent to eliminate the Van Dyke employees who had "heritage costs". Respondent admitted, however, that they had secured

the module contract before the decision was made to close the Van Dyke plant. See, Respondent's Exhibit 20, Muckley dep. p. 156, ROA 681. Thus, this case does not present a situation where the decision to close had been made and then new business was obtained requiring a change in decision. The Respondent clearly had the module contract when it made the decision to close Van Dyke and place the work at Mancini Drive.

C. Respondent claims that closing the plant cost $15 Million, of which $9.7 million was curtailment cost. However, Respondent only cited a partial document to support those figures. The full document shows that after further audit and validation the curtailment costs for including pension and medical had been reduced to $6.6 Million, or a 63% reduction from the initial estimated $17.9 million in 2003 and the pre-audit $9.7 Million referred to by Respondent. See, Petitioner's Exhibit 5, *#07749*.[1]

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[1]Respondent at page 18 of its Opposition claims that Petitioners misrepresented the testimony of Bruce Hoover. Respondent claims that on page 14 of their brief on appeal Petitioners claimed that Hoover considered curtailment gains and losses in determining where to place the module business. Page 14 of Petitioner's Brief on Appeal does not address this issue and it is not clear this issue was raised by Petitioners below. Whether Hoover knew of the specific curtailment analysis at Van Dyke being reduced to the point that closure was possible does not matter. It is evident from Hoover's March 23rd email to Michelle Hill that the Company considered the size of the curtailment costs, (i.e. the benefits it could obtain from immediately paying to extinguish rights of employees to future benefit costs) was the major factor in a decision to close a plant. Indeed, in this email, Hoover states unequivocally that the curtailment costs at one of its Canadian plants was too prohibitive to consider closing it. (Exhibit 7 *#06830*). This is the same document in which Hoover states that Howard Puuri is still saying the module work was going to the Van

D. Respondent claims it did not agree to any requests of the union to grant any additional pension credits to any of the Petitioners because the union refused to compromise on any requests by the company. The reality is the only concession the Company sought in the negotiations with the union was to eliminate its obligations for retiree medical costs. This evidence supports the Petitioners claim that the closing was directed at their ERISA protected benefits because it shows TRW was not satisfied with merely cutting off active employees from accruing further rights to pensions or retiree medical, but that it also wanted to get the union to give away the retiree medical benefits enjoyed by the existing retirees had.[2]

II. REPLY TO LEGAL ARGUMENTS

A. APPLICABILITY OF ERISA 510 TO LAY OFF AND RECALL DECISIONS AND EVIDENCE TO SUPPORT THE CLAIMS OF CRAWFORD, HOSKINS AND POWELL.

The Respondent claims that Petitioners' misrepresent the holding of the District Court and Court of Appeals as to whether ERISA 510 applies to decisions on layoffs or recalls. While it is true that the District Court seemed, on reconsideration, to accept

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Dyke Plant. (Exhibit 7 *#06831*).

[2]Indeed, consistent with the company plan to eliminate employees with heritage costs, the company made reduction of these costs the "centerpiece" of its strategy at Van Dyke. (Exhibit 5, *#07746*). Furthermore, in January of 2006 during the negotiations, the company President Mr. Plant specifically stated he would not allow any "bridging" of employees to the 30 year level as this would cost them money associated with the benefits. (Exhibit 18, *#07717*).

that ERISA 510 reached decisions not to recall an employee where that decision was based on an intention to interfere with the employee attaining ERISA protected rights, the Court of Appeals was less clear. In the context of a plant closing, where the failure to recall an employee interferes with that employee's ability to accrue significant benefits before the plant closes, the company has effectively discharged the employee or discriminated against him/her.

In both courts the claims of the three individuals failed because the courts stated there was no evidence to support a claim that TRW considered eligibility for ERISA benefits when deciding not to recall anyone. This finding is so far from the accepted and usual judicial proceedings that this court should consider reversing the findings on these facts. That is, before the court were documents showing that TRW had analyzed how close all employees were to full vesting, (ROA, Respondent's Exhibit 26, 694-701) and emails showing (a) a hostility to bridging any employees, and (2) emails after March of 2006 stating no one should be recalled. It is difficult to imagine more direct evidence that TRW wanted no one else crossing the 30 year threshold. Both lower courts below egregiously violated the rules regarding giving the non moving party the benefit of favorable inferences from the evidence.

B. MIXED MOTIVE

The Respondent claims this Court should not address the mixed motive issue for two reasons: (1) the issue was not raised below, and (2) that employers are not prohibited from considering costs of ERISA

benefits before making business decisions.

As to the first reason, Respondent acknowledges that *Singleton v Wulff* , 428 U.S. 106 (1976) does not prohibit this Court from this court from considering issues not addressed in the lower courts. The rationale for the general rule for not considering issues not addressed in the lower courts, was stated in *Hormel v Helvering,* 312 U.S. 552 (1941). That rationale does not apply in the present case. In *Hormel* this Court found because it is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence", issues not ruled on by the lower courts should not generally be addressed on appeal. In this case, the Petitioners submitted evidence to support their claims of intentional interference and the Respondent submitted evidence and its alleged legitimate non interfering reasons for its actions. In this case, it is the allocation of the burden of proof which is at issue, and not the evidence.

As to the second reason, the law **does prohibit** employers from considering the cost of pensions in making some business decisions including the one in this case. The cases cited by Respondent and referenced by the lower courts are instances where the court found that either the company had not considered pensions costs in a business decision, *Smith v Ameritech*, 129 F.3d 857, (6th Cir. 1997), or that there was no evidence presented that a desire to avoid retirement benefit liability was a determining factor in

the adverse action, *Majewski v Automatic Data Processing Inc.* 274 F.3d 1106 (6th Cir. 2001), or loss of pension benefits was incidental to loss of employment, *Daughtrey v Honeywell Inc.*, 3 F.3d 1488, (11th Cir. 1993). But in this case both the District and the Appeals Court had to admit that TRW had used the cost of pensions in making the decisions to close the Van Dyke Plant.

In the District Court, despite all the evidence showing TRW's desire to rid itself of heritage cost laden employees, Respondent claimed overcapacity as the reason for closing the Van Dyke plant and stated its reasons such as inadequate ingress and egress, etc, as to why it did not cure the overcapacity problem by placing the module and other work it had successfully bid on in the Van Dyke Plant.

The District Court then refused to allow Petitioners to challenge the credibility or reasonableness of Respondent's reasons for not placing new work or the module work in the Van Dyke plant claiming Petitioners could not question Respondent's "business judgment" to prove pretext. While the Court of Appeals did not agree that TRW's "business judgment" could not be questioned the Court erroneously assumed that the only relevant evidence that Petitioners could use to support their claims was that they were "close" to vesting when the company made the decision to close. While temporal proximity to vesting may show intent to interfere in some cases, such evidence is not necessary where the allegation is not interference with vesting but with "attainment of any right" e.g. to a higher pension. See *Majewski, supra*, at 1113. After finding that Petitioners had

pointed to testimony and a variety of documents showing TRW's "desire to reduce pension costs and reducing those costs played a definite role in TRW's decision to shut down Van Dyke" (and that TRW had not denied this) (12a), the Court ruled against Petitioners because they could not carry **their burden of persuasion** of a 510 violation because a majority of the Petitioners needed more than 5 years to attain benefits associated with 30 years of pension credit.

In both the District Court and the Court of Appeals the Court set up a hurdle of evidence that Petitioners could not clear by continuing to **place the burden on them** once it was already proven and admitted by TRW that "desire to reduce pension costs played a definite role in the decision to shut down Van Dyke". This is the precise context in which the mixed motive analysis should be used and in which TRW would have to prove, like the defendant in *Gavalik v Continental Can Co.*, 812 F.2d 834, (3rd Cir 1987), that the same result would have happened had the desire to reduce pension costs not played a role in the decision to close Van Dyke.[3]

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[3]Respondent in footnote 6 on page 20 of its Opposition claims that the Financial Accounting Standards Board requires the consideration of these costs. This is untrue. Standard 88 addresses merely show how such gains or losses are to be reported for tax purposes. They have nothing to do with a company deciding to close a plant and cut off the rights of active employees to future accruals of benefits through figuring out how much it would gain or lose by closing the plant. The fact that many of the documents show plans to turn the curtailment losses at Van Dyke into a gain by combining its closure with two other plants, is clear evidence of intent to interfere. It does not militate against a finding of specific intent that TRW paid restructuring costs when it closed the plant. To the contrary, it shows a company dedicated

C. ALTER EGO

Respondent claims, on page 22, that the Mancini Drive Plant could not be the alter ego of the Van Dyke Plant because the doctrine does not apply in the context of different facilities of the same employer and that Petitioners had cited no case holding such. This is not true. Petitioners cited below and cite again herein the doctrine of *double breasting*, which applies in situations like the present where the same employer will set up a non union facility to do work that the union facility could have had. See *NLRB v Fullerton Transfer & Storage Ltd. Inc.*, 910 F.2d 331 (6th Cir. 1990). A double breasted alter ego is the same as an alter ego where there is clearly an attempt to disguise the new owner. Not only was Mancini Drive an alter ego of Van Dyke, the fact that TRW changed from sourcing the module work from Van Dyke to this new plant is further evidence of TRW's specific intent to rid itself of is heritage cost laden employees and thus interfere with Petitioners rights under section 510.

CONCLUSION

For the reasons stated here and in the initial Petition for Certiorari, this Court should grant the writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

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to doing away with employees with heritage costs so it will benefit from not having those workers in its workforce in the future.

EISNER & MIRER, P.C.
113 University Place, 8th Flr.
New York, New York10003
JEANNE E. MIRER
(Counsel of Record)
(212) 473-8700

MOTION FILED
1460 NOV 27 2009
(2)

No. 09-494

IN THE

Supreme Court of the United States

JERRY CRAWFORD; CHARLES ANNABEL; DARRYL BALLARD; MATTHEW BURDO; DON HOSKINS, ROY LANNING; PETER POWELL, WANDA SIMPSON, DANIEL SLANE, PETITIONERS

v.

TRW AUTOMOTIVE U.S. LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR MAURICE & JANE SUGAR LAW CENTER FOR ECONOMIC & SOCIAL JUSTICE AND INTERFAITH WORKERS JUSTICE AS AMICI CURIAE SUPPORTING PETITIONERS

JOHN C. PHILO
Maurice & Jane Sugar Law Center for Economic & Social Justice
4605 Cass Avenue
Detroit, MI 48201
(313) 993-4505

WILLIAM GOODMAN
Counsel of Record
Goodman & Hurwitz PC
1394 E Jefferson Ave
Detroit, MI 48207
(313) 567-6170

CURRY & TAYLOR • (202) 293-4141

MOTION OF THE MAURICE & JANE SUGAR LAW CENTER FOR ECONOMIC & SOCIAL JUSTICE AND INTERFAITH WORKERS JUSTICE FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Now Comes the Maurice & Jane Sugar Law Center for Economic & Social Justice (Sugar Law Center) and Interfaith Workers Justice (IWJ) and respectfully moves this Court for leave to file the accompanying brief as *amici curiae* in support of the Petition for Writ of Certiorari submitted by Jerry Crawford, Charles Annabel, Darryl Ballard, Matthew Burdo, Don Hoskins, Roy Lanning, Peter Powell, Wanda Simpson, and Daniel Slane.

While Petitioners have consented to the filing of the *amici curiae* brief, the Respondent TRW Automotive U.S. LLC has refused to grant consent, necessitating this motion.

Based in Detroit Michigan, the Sugar Law Center is a leading national nonprofit whose central mission concerns the promotion of economic and social rights as human rights and civil rights within our nation's legal system. Consistent with our mission, the Law Center is extensively engaged in worksite closing and mass layoff litigation throughout the country and we are one of a very few nonprofit law centers who have undertaken such work. The Sugar Law Center is deeply interested in this case, because its outcome could affect the rights of workers to obtain a remedy for violations of the Employee Retirement Income Security Act §510 at the time of plant closings. Without

such remedy, the human right to social security is jeopardized for all our nation's workers.

Interfaith Workers Justice is one of the preeminent national nonprofit organizations dedicated to improving wages, benefits, and working conditions for all. Based in Chicago, Illinois and with a network of affiliated local organizations throughout the country, IWJ educates, organizes, and mobilizes the religious community to work with other community and labor groups on human rights and employment issues including workers wages, health care benefits, and pensions to allow workers and their families to retire with dignity. Interfaith Workers Justice has extensive expertise and is deeply interested in the issues pending before the Court because of their potential impact on the rights of working people to attain retirement benefits without interference so as to live above poverty and with dignity in old age.

Petitioners have thoroughly briefed the substantive issues of the case within the context of existing federal legislation and related case law. *Amici's* proposed brief does not repeat the substance of Petitioner's arguments but rather discusses the relationship of the issues to obligations existing under international human rights law. A universal right to social security is recognized by the United States and that right is fulfilled by public benefits and the regulation of private retirement plans. This context provides guidance and persuasive authority for the Court in deciding the merits of the pending Petition for Writ of Certiorari.

For the above reasons, this motion for leave to file the attached brief *amici curiae* should be granted.

Respectfully submitted,

WILLIAM GOODMAN
GOODMAN & HURWITZ PC
1394 E Jefferson Ave
Detroit, MI 48207
(313) 567-6170
(Counsel of Record)

-and-

JOHN C. PHILO
MAURICE & JANE SUGAR LAW CENTER
FOR ECONOMIC & SOCIAL JUSTICE
4605 Cass Avenue
Detroit, MI 48201
(313) 993-4505

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INTERESTS OF THE *AMICI CURIAE*[1]

The Maurice & Jane Sugar Law Center for Economic & Social Justice[2] is a leading national nonprofit law center and one of a very few such organizations that is extensively engaged in worksite closing and mass layoff litigation on behalf of our nation's workers. The Sugar Law Center is deeply interested in this case, because its outcome could affect the right of workers to obtain a remedy for violations of the Employee Retirement Income Security Act (ERISA) §510 during plant closings and mass layoffs. The judgment of *amici* is based on over 15 years of experience and accomplishment in the representation of thousands of displaced workers before federal and state trial and appellate courts throughout the country.

Interfaith Workers Justice is nationally recognized nonprofit with a national network of affiliated local organizations. IWJ is one of the preeminent organizations dedicated to improving wages, benefits, and working conditions. The organization educates and mobilizes the religious community to work with others advocating for the human rights of all workers, including the right to fair wages, health care benefits, and pensions to allow workers and their families to retire with dignity.

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amici curiae, its members or its counsel have made any monetary contribution to the preparation or submission of this brief.

[2] The Sugar Law Center is affiliated with the National Lawyers Guild (NLG). The NLG is a progressive bar association of attorneys and legal workers working in support of human rights.

Interfaith Workers Justice has extensive expertise with and is deeply interested in the issues pending before the Court. The judgment of *amici* is based on over a decade of experience and accomplishment working with workers, their families and communities to mobilize protection of workers rights, implement legal strategies, and advance policy reform.

Pursuant to Rule 37, all parties received notice of the intention to file *amici curiae* brief at least 10 days prior to the due date. Petitioners have granted consent to the filing of the *amici curiae* brief. Respondent TRW Automotive U.S. LLC has declined consent for the filing of the *amici curiae* brief.

INTRODUCTORY STATEMENT & SUMMARY OF ARGUMENT

This case arises from violations of an employee's right to attain retirement benefits through a private plan offered at their workplace. The Petitioner's worksite was covered by a defined benefit pension plan, which provided employees with increased benefits based on the number of accrued benefit service years worked. Employees who retired with thirty or more benefit service years were entitled to full retirement benefits, including pension income and health care. Benefit service was earned for each calendar year in which the employee worked 1680 hours. However if an employee was laid off during the calendar year, the employee was required to work an additional 170 hours for that year to be credited as a year of benefit service.

Many Petitioners had acquired thirty years of seniority with the employer but had not yet acquired

thirty years of benefit service. Three of the Petitioners were in their thirtieth year of benefit service, but because of their status on layoff, were waiting to be recalled. These employees only had to work 170 additional hours before they would have obtained thirty years of benefit service. Because of the Respondent's illegal actions, both groups of Petitioners lost the right to earn further benefit service credits. As result, **all** Petitioners lost the right to earn increased benefits under the retirement plan.

Under international human rights law, all persons have a right to social security, including income maintenance and affordable health care in old age. Nations often meet their human rights obligation by providing a combination of public benefits and access to private plans, which are regulated to prevent employers from unfairly interfering with an employee's ability to attain plan benefits. In the United States, private benefits are principally regulated by the Employee Income and Retirement Security Act.

Amici argues that within a context of protecting citizens' right to social security, ERIA §510 should be liberally construed so as to enforce the statute in the context of plant closings and discriminatory layoffs and recalls and to provide meaningful remedies to affected workers.

ARGUMENT

I. IN THE UNITED STATES, THE HUMAN RIGHT TO SOCIAL SECURITY IS, IN PART, PROTECTED BY THE REGULATION OF PRIVATE RETIREMENT BENEFITS.

1. Federal Statutes Are Properly Interpreted To Uphold Human Rights Norms

United States courts' consideration of human rights standards is not an aberration, but rather is a reflection of the historical role international law has played in shaping American law. International law generally consists of treaties, international custom as evidenced by state practice, and preemptory norms from which no civilized nation would digress. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 255 at n. 5 (2d Cir. 2009); and *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 250-51 (2d Cir. 2003).

The U.S. Constitution provides that treaties are within the laws of our nation. U.S. Const., art. VI, §1, cl. 2. Likewise, customary international law and preemptory norms are also part of our law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 737-38, 124 S.Ct. 2739, 159 L.Ed.2d 718, (2004); and Abdullahi *v. Pfizer, Inc.*, 562 F.3d 163, 176-77 (2d Cir. 2009). *See also* Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of Customary Law of Nations*, 14 U.C. Davis J. Int'l L. & Pol'y 205, 253 (2008). State practices that evidence customary law take many forms

and include what states do within international organizations and what they do through domestic actions. *See* Restatement (Third) of Foreign Relations Law of the United States § 102 (1987).

The effect of international law in maintaining causes of action and providing remedies to litigants is the subject of much debate, however recognized human rights standards is, at a minimum, strongly persuasive authority for developing continued understandings of domestic law.

This Court and other federal courts have long found that international human rights law provides persuasive guidance on understanding the scope of rights conveyed by the Constitution and federal legislation. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); *Lawrence v. Tex.*, 539 U.S. 558, , 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); and *Atkins v. Va.*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

While a majority of cases arise within the context of constitutional challenges, human rights standards have been found equally useful in determining the scope of rights granted by statute. In *Yusupov v. Attorney Gen. of U.S.*, 518 F.3d 185 (3d Cir. 2008), the Third Circuit recognized:

> [T]hat courts often look to legislative history because it can be a useful aid to statutory construction, and to international law to the extent that it has been incorporated into our law.

Id. at 204 n. 31. *See also Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 436-40, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987); *Delgado v. Holder*, 563 F.3d 863, 875-76 (9th Cir. 2009); and *Stephens v. Nat'l Distillers and Chem. Corp.*, 69 F.3d 1226, 1233 n. 6 (2d Cir. 1995).

American courts have further found that federal statutes should be construed in such a manner as to avoid conflicts with human rights standards. This Court has held that "an act of congress ought never to be construed to violate the law of nations."*Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804). *See also Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982); and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963). A natural corollary of this maxim is that federal statutes should be interpreted to uphold human rights standards.

In the present case, international law universally recognizes an individual's right to social security at the end of one's working life and these rights are domestically realized through statutes including the Employee Retirement Income Security Act, 29 U.S.C.A. § 1001, *et. seq.* (WestLaw 2009) [hereinafter ERISA]. As a result, ERISA § 510 should be interpreted to effect a meaningful realization of citizen's right to social security.

2. The Scope Of Citizens' Right To Social Security Is Well Defined

The elements of a citizen's right to social security encompass a right to income maintenance and access to medical care at the end of one's working life. The United Nations describes the elements of a right to social security as follows:

> The right to social security encompasses the right to access and maintain benefits ... in order to secure protection, *inter alia*, from (a) lack of work-related income caused by ... old age; (b) unaffordable access to health care...

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, *available at* http://www.unhcr.org/refworld/docid/47b17b5b39c.html [accessed 19 November 2009] [CESCR General Comment No. 19].

Under international law, the minimum amount of income maintenance and health care necessary to fulfill citizens' right to social security is described as benefits providing an "an adequate standard of living and adequate access to health care." *Id.* at 7. An adequate standard of living contemplates that all persons shall enjoy support to obtain the necessities of life but also support to participate in society with dignity. The right clearly contemplates that persons will have income and health care benefits which enable them live above the poverty line.

International human rights standards recognize that the right to social security can be met by a mixture of public and private plans. *Id.* at 2, 4 & 5. When private plans are used, standards require that regulatory frameworks ensure that private actors such as corporations do not unduly interfere with an individual's right to receive social insurance and private pension benefits. *See Id.* at 13.

3. The Right To Social Security Is Established By Treaties Of The United States And By Customary International Law

Citizens' right to social security and health care is evidenced by both treaties of the United States and customary international law. In 1948, the United States and other nations convened for the 9th International Conference of American States, which was led by the U.S. Secretary of State, Gen. George Marshall. At the conference, delegates adopted the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, [hereafter *Charter of the O.A.S*], as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 and adopted the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. LV/I.4 Rev. (1965) [hereafter *American Declaration*].

The *Charter of the O.A.S.* was signed by the United States in 1948 and ratified by the United States Senate in 1951. The *Charter of the O.A.S.* is a legally binding treaty and as such, is a statement of international law recognized within our body of laws.

The *Charter of the O.A.S.* at Article 3 recognizes that all persons are entitled to their fundamental human rights and at Articles 3 and 45 recognizes a citizen's specific right to social security. The treaty reads, in relevant part, as follows:

> **Article 45**
> The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:
> ***
> b) Work ... ***should be performed under conditions, including a system ... that ensure[s] ... a decent standard of living for the worker and his family ... in his old age*** ...
> * * *
> h) Development of ***an efficient social security policy***.

Id. (emphasis added).

A citizen's right to health care is also affirmed by the *Charter of the O.A.S.* At Articles 34 and 45, the treaty reads, in relevant part, as follows:

> **Article 34**
> The Member States agree . . . to devote their utmost efforts to accomplishing the following basic goals:
> ***

> i) ***Protection of man's potential through the extension and application of modern medical science***;
>
> ***
>
> **Article 45**
> The Member States . . . agree to dedicate every effort to the application of the following principles and mechanisms:
>
> ***
>
> b) Work ... should be performed under conditions, including a system ... ***that ensure[s]*** ... ***health*** ... for the worker and his family, both during his working years and ***in his old age***.

Id. (emphasis added).

While not an official treaty, the *American Declaration* is widely viewed as the world's first international human rights instrument and provides confirmation of O.A.S. member states' commitment to citizen's fundamental rights. Adopted at the same convention and by the same body of delegates as the Charter of the O.A.S., the *American Declaration of Rights and Duties of Man* explicitly recognizes a right to social security. The American Declaration provides:

> **Whereas**
>
> ***
>
> The international protection of the rights of man should be the principal guide of an evolving American law;
>
> ***
>
> **Right to the preservation of health and to well-being.**

> Article XI. Every person has the right to the preservation of his health through ... medical care, to the extent permitted by public and community resources.
>
> ***
>
> **Right to social security.**
> Article XVI. Every person has the right to social security which will protect him from the consequences of . . . old age.

American Declaration, supra.

Citizens' right to social security is further established by customary international law. In addition to the *Charter of the O.A.S.* and the *American Declaration*, a universal and specific right to social security is recognized by instruments of the United Nations and the International Labor Organization. *See* International Covenant on Economic, Social, and Cultural Rights, art. 9, Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (parties "recognize the right of everyone to social security"); International Labor Organization, ILO Constitution, art. III(f), *available at* http://www.ilo.org/public/english/about/ilocons t.htm; International Labor Organization, Social Security (Minimum Standards) Convention (No. 102), April 27, 1955, *available at* http://www.ilo.org/ ilolex/english/convdisp1.htm (last viewed Nov. 14, 2009); International Labor Organization, Invalidity, Old Age and Survivor's Benefits Convention (No. 128), Nov. 1, 1969, *available at* http://www.ilo.org/ ilolex/english/convdisp1.htm (last viewed Nov. 15, 2009). See also Council of Europe, European Social Charter (Revised), art. 12, ¶ 12, 3 May 1996, ETS 163. The United States is a member of both the United

Nations and the I.L.O. and at no time has objected to recognition of social security as fundamental human right.

In practice, the right to social security and medical care in old age is recognized by almost all nations. Across the globe, approximately 170 nations have laws protecting citizens' right to social security through laws providing for income security and medical care to citizens in old age. See ILO, Social Security Department, *Social Security Database Programs and Mechanisms, available at* https://www.ilo.org/dyn/sesame/ifpses.socialdatabase last viewed Nov. 16, 2009). Within American and Caribbean nations, at least 28 of 31 independent nations have such laws. *Id.*

While a right to social security and health care in old age is well-recognized within international law, the right is tangibly realized through domestic legislation.

4. The United States Plan To Provide For Citizen's Social Security Includes Public Benefits Supplemented By Private Plans.

The legislative history of the Social Security Act, 42 U.S.C.A. §301 *et seq.* (WestLaw 2009) [hereafter SSA] reveals that legislators intended to protect citizens' *right* to income security and health care in old age. As stated by Representative Charles Vilas Traux (D-Ohio) during congressional debates:

> The enactment into law of ***old-age pensions***, unemployment compensation, protection for mothers and dependent children, and the

> ***preservation of public health*** will mark another ***milestone in the battle for human rights*** waged by President Franklin D. Roosevelt and the Seventy-fourth Congress.

___ Cong. Rec. – House 5689 (daily ed. April 15, 1935) *available at* ,http://www.ssa.gov/history/pdf/h415.pdf (last viewed Nov. 15, 2009) (emphasis added). *See also* H.R. No. 615 at (1935) *available at* http://www.ssa.gov/history/reports/35housereport.html (last viewed Nov. 15, 2009) (See section concerning Old Age Benefits); ___ Cong. Rec. – House 5827 (daily ed. April 16, 1935) *available at* http://www.ssa.gov/history/pdf/h416.pdf (last viewed Nov. 15, 2009) (Comments of Rep. Haines; ___ Cong. Rec. – House 5792 (daily ed. April 16, 1935) *available at* http://www.ssa.gov/history/pdf/h416.pdf (last viewed Nov. 15, 2009) (Comments of Rep. Sirovich); and __ Cong. Rec. – House 5468 (daily ed. April 11, 1935) *available at* http://www.ssa.gov/history/pdf/h411.pdf (last viewed Nov. 15, 2009) (Comments of Rep. Doughton).

The Social Security Act was amended in 1965 to provide medical benefits to elderly citizens through the Medicare program. This amendment affirmed our nation's recognition of health care as a fundamental right of citizens. One scholar has noted that through Medicare and other programs:

> The United States has established a considerable legal infrastructure that effectively recognizes the human right to health care for some groups under specific circumstances.

Eleanor D. Kinney, *Recognition of the International Human Right to Health and Health Care in the United States*, 60 Rutgers L. Rev. 335, 348 (2008)

The United States, like a notable minority of other nations, protects the right to social security and health care in old age through a combination of public benefits and private plans. The intent to protect these rights with a combination of public benefits and private plans was recognized at the outset of congressional consideration of the Social Security Act. During Senate debates, Senator Elbert D. Thomas (D-Utah) observed:

> [T]he time must come when no one shall question the right of those who are past the earning age to live a life free from the ordinary economic worries. All must contribute for the good of all. ***Public attention to social security will result in persons taking for themselves private annuity policies to augment the public ones. The partnership idea is the one that I would stress.*** Partnership between the Federal Government and the States ... and ***partnership between public and private insurance institutions.***

____ Cong. Rec. – Senate 8224 (daily ed. May 27, 1935) *available at* http://www.ssa.gov/history/pdf/senate1.pdf (last viewed Nov. 15, 2009).

The partnership between public and private insurance is most dramatically illustrated by public benefits provided by the SSA and protection of private retirement benefits through ERISA. The United States thereby combines a right to certain minimum benefits

through the SSA and contemplates supplementation through private pensions regulated by ERISA. Within the United States, this combination of public and private benefits during retirement is necessary for citizens to maintain an adequate standard of living consistent with their right to social security.

A majority of persons in this country rely on a combination of public and private benefits to maintain an adequate standard of living in retirement. Government statistics confirm that retirement benefits provided by the SSA fail to provide sufficient income for many citizens to maintain a standard of living above the poverty line. In September 2009, the average monthly benefit from the SSA for a retired worker was estimated at $1,160.90. *See* U.S. Social Security Administration, *Monthly Statistical Snapshot, September 2009*, *available at* http://www.socialsecurity.gov/policy/docs/quickfacts/stat_snapshot/ (last viewed Nov. 19, 2009). The average worker would thereby annually receive $13,930.80 in SSA benefits.[3] The U.S. Census Bureau estimates the poverty threshold for a single person at $10,991.00. U.S. Census Bureau, *Poverty Thresholds for 2008 by Size of Family and Number of Related Children Under 18 Years*, (2008), *available at* http://www.census.gov/hhes/www/poverty/threshld/thresh08.html (last viewed Nov. 18, 2009). The National Academy of Sciences and others have criticized the official poverty threshold as grossly underestimating the amount of income necessary for persons to remain above poverty. Anna Bernasek, *A Poverty Line That's Out of Date and Out*

[3] Notably this amount is less the annual salary of a worker employed at the minimum wage.

of Favor, NYTIMES, Mar. 12, 2006 *available at* http://www.nytimes.com/2006/03/12/business/yourmoney/12view.html (last viewed Nov. 16, 2009). Whatever calculations are used however, it is clear that many retired persons' would be unable to maintain adequate standards of living above poverty without supplementing their SSA benefits.

The largest source of supplemental income for older persons who have left the workforce is private pensions. U.S. Social Security Administration, Office of Retirement and Disability Policy, *Income of the Population 55 or Older, 2006* at Table 2.A1 *available at* http://www.socialsecurity.gov/policy/docs/statcomps/income_pop55/2006/sect02.html (last viewed Nov. 18, 2009). The Social Security Administration estimates that private pensions make up 8% of total income at age 55 and more than 30% of total income by age 70. *Id.*

Persons aged 50 years and older are particularly vulnerable to pension insecurity. *See generally* Barbara A. Butrica, Howard M. Iams, Karen E. Smith, and Eric J. Toder, *The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement Incomes of Baby Boomers*, Social Security Bulletin Vol. 69, No. 3 (2009) *available at* http://www.socialsecurity.gov/policy/docs/ssb/v69n3/v69n3p1.pdf (last viewed Nov. 19, 2009). These individuals remain the last generation of workers with defined benefit employer retirement plans. *Id.* at p. 3. Traditionally, defined benefit plans are nonportable and subject to vesting requirements based on lengthy tenures of work at a single employer. Newer employees are now typically hired under defined contribution plans, which require years of periodic

investment over a lifetime of work to obtain meaningful benefits. Older employees are caught in a particularly vulnerable position when they lose their jobs late in their working life. Such workers are unable to obtain the full value of their defined benefits plan and unable to recoup losses through a defined contribution plan due to limited remaining work years. *See Id.* at p. 19. And, it is these employees who are suffering over forty percent of all long-term layoffs in recent years. *See* U.S. Department of Labor Statistics, *Mass Layoff Statistics Database, available at* http://www.bls.gov/mls/data.htm (last viewed Nov. 19, 2009).

Likewise, denial of private plan retirement income and lifetime health insurance benefits directly implicates workers ability to maintain adequate standards of living after the end of their work life. Medicare presently accounts for approximately 50% of the medical costs incurred by persons 65 years and older. U.S. Department of Health & Human Services, Centers for Medicare & Medicaid Services, Health Expenditures by Age, 2004 Age Tables, *Personal Health Care Spending by Age Group and Source of Payment, Calendar Year 2002 available at* http://www.cms.hhs.gov/NationalHealthExpendData/downloads/2004-age-tables.pdf (last viewed Nov. 19, 2009). Private health insurance and out-of-pocket payments each account for approximately 30% of these costs for such individuals. *Id.* The absence of earned pension benefits or lifetime health insurance from an employer causes unanticipated costs to be paid from modest SSA income jeopardizing an individual's ability remain above poverty.

For persons in the later years of their work life who face job separations, their right to social security is very much threatened by employer action taken to avoid paying full retirement benefits. At issue in this case is whether federal law protecting workers retirement benefits will be interpreted to promote and protect their human right to social security or whether this right will be compromised in derogation of their right to adequate standards of living in old age.

II. ERISA §510 SHOULD BE LIBERALLY CONSTRUED TO PROHIBIT DISCHARGES AND DISCRIMINATION AGAINST WORKERS TO AVOID THEIR ATTAINMENT OF BENEFIT PLAN RIGHTS.

This Honorable Court should liberally construe the provisions of ERISA §510 to give effect to the remedial and human rights purposes of the Act. ERISA is clearly a remedial statute. *Jakimas v. Hoffmann-La Roche, Inc.*, 485 F.3d 770, 784 (3d 2007); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236 (4th Cir. 1991); and *Kross v. Western Elec. Co., Inc.*, 701 F.2d 1238, 1242 (7th Cir. 1983). Federal courts have long held that remedial statutes should be given liberal construction to affect intended purposes. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); and *In re Carter*, 553 F.3d 979, 985-986 (6th Cir. 2009).

Federal courts have further found that civil rights statutes are liberally construed to effect remedial purposes. *See, Forester v. Chertoff*, 500 F.3d 920, 929 (9th Cir. 2007); *Tart v. Hill Behan Lumber Co.*, 31 F.3d 668, 671 (8th Cir.1994); and *Crozier v.*

Howard, 11 F.3d 967, 969 n. 3 (10th Cir. 1993). ERISA §510 is an important component of United State's legislation protecting citizen's human right to social security. As such, it should be interpreted analogous to civil rights statutes and be liberally construed to affect the purpose of preventing actions intended to interfere with an employee's attainment of plan benefits.

1. ERISA §510 Protects Workers Against Discharges Resulting From Worksite Closings And Discriminatory Layoff And Recall Decisions.

ERISA §510's plain language prohibits discharges and discriminatory acts taken with an intent to prevent an employee's attainment of retirement plan benefits. The statute states:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

29 U.S.C. § 1140 (WestLaw 2009). This language is consistent with international law obligations concerning the protection of citizen's human right to social security. International law requires states to "prevent third parties from interfering in any way with the enjoyment of the right to social security." CESCR General Comment No. 19. *supra* at p. 13. Consistent with these obligations, ERISA's language prohibits

undue interference and is not qualified or conditioned upon specific operational contexts of the involved worksite.

Managerial decisions made in the context of worksite closings can violate ERISA §510. In the courts below, Respondent argued that ERISA §510 is inapplicable to managerial decisions made during plant closings. Both the trial court and the United States Court of Appeals for the Sixth Circuit correctly held that ERISA §510 applies to discharges occurring in the context of plant closings. In *Inter Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry.*, 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997) [hereafter *Inter Modal*] this Court recognized that ERISA's provisions grant employers wide flexibility to reduce or even eliminate promised benefits in the face of an economic downturn. *Id.* at 515. However the Court's decision also recognized that this flexibility is counterbalanced by ERISA §510 which prohibits employers from "circumvent[ing] the provision of promised benefits." *Id.* (citations omitted). The decision noted further that an employer seeking to alter promised benefits must adhere to the plan's procedures. *Id.* at 516. Consistent with the *Inter Modal* decision, the Sixth Circuit held that:

> While "[e]mployers or other plan sponsors are generally free under ERISA ... to adopt, modify or terminate" pension benefit plans, *Coomer v. Bethesda Hosp. Inc.*, 370 F.3d 499, 508 (6th Cir. 2004), this discretion does not permit them to discharge employees or alter their plan rights to "circumvent the provision of promised benefits." *Inter-Modal Rail Emples. Ass'n v. Atchison,*

> *Topeka & Santa Fe Ry.*, 520 U.S. 510, 515, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997) (internal quotations omitted).

Crawford v. TRW Automotive, 560 F.3d 607, 612 (6th Cir. 2009). The Sixth Circuit erred however in finding that the failure to recall is not a prohibited practice under ERISA §510.

The Respondent's failure to recall the employees was a discriminatory act within conduct prohibited by ERISA §510. The discriminatory act occurred when the employer failed to recall the Petitioners from layoff so as to thwart these employees from further attaining plan benefits. Thus, two prohibited practices are at issue in this case. First, the discharge of the employees through the plant's closure and second, the discriminatory failure to recall the employees from layoff.

To establish an ERISA §510 claim, an employee must show "that an employer had a specific intent to violate" the employee's ERISA rights. *Smith v. Ameritech*, 129 F.3d 857, 865 (6th Cir. 1997). The employee is not required to show that the employer's sole intent was to interfere with ERISA rights but rather that it was a "motivating factor" in the employer's decision. *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992). Additionally, the employee must establish a causal link between the adverse employment decision and the likelihood of future benefits. *Pennington v. Western Atlas, Inc.*, 202 F.3d 902, 906 (6th Cir. 2000) (quoting *Smith v. Ameritech*, *supra*).

The aggrieved party can show specific intent through direct evidence or, in the absence of direct evidence through a showing of: 1) prohibited conduct; 2) taken with the purpose of interfering; with 3) an employee's right to attain plan benefits. *Smith v. Ameritech, supra* at 865. *In the absence of direct evidence,* courts employ a burden shifting analysis, similar to that found in *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). However the *Burdine* burden shifting approach only applies "**if there is no direct evidence of the employer's motivation.**" *Humphreys v. Bellaire Corp., supra* at 1043 (emphasis added).

The Sixth Circuit erred when it failed to apprehend substantial direct evidence of an intent to interfere with Petitioner's rights under their retirement plan and failed to then apply a mixed-motive analysis as stated in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). Direct evidence put forth by Petitioners included admissions by the Respondent company's vice president whereby he concedes that pension costs were one factor in the closing of the facility and resulting discharge of the workers. This evidence implicates prohibited conduct under ERISA consisting of the employees' resulting discharge at the time of the closing. The Sixth Circuit further erred by failing to consider direct evidence of the employer's specific intent to engage in prohibited conduct through the discriminatory failure to recall Petitioners from layoff while the plant remained open and work was available.

As noted by this Court in *Inter Modal*, ERISA grants employers broad latitude to modify and even terminate retirement plans; however to do so, employers must follow statutory and plan requirements. In the present case, the Respondent made a conscious decision to forgo modification or termination of the plan pursuant to legal requirements in favor of engaging in prohibited conduct, which included the discharge of the employees during the plant closing and the discriminatory failure to recall employees from layoff when work was available before the closing.

For the remainder of their arguments on these issues, *amici* adopts by reference the arguments of the Petitioners as stated on pp. 15 through 26 of pending *Petition for Writ of Certiorari.*

2. Effective Equitable Remedies Exist To Redress Illegal Discharges Resulting From A Plant Closing And To Redress Discriminatory Conduct Occurring Before A Closing.

While courts do not favor consideration of liability when remedies are unavailable, courts should not forgo permitted remedies so as to avoid a consideration of liability. Respondents have incorrectly argued that no effective remedy is available to Petitioners under ERISA §510.

Appropriate equitable relief is available to remedy the illegal conduct of the Respondent. ERISA §502(a)(3) broadly empowers federal courts to grant any "appropriate equitable relief" to redress violation

of the statute. 29 U.S.C. § 1132(a)(3)(B). Section 502 upholds international law principles, which require states to enact appropriate regulatory schemes and to provide remedies when citizens' rights are violated. See CESCR General Comment No. 19. *supra* at p. 14, ¶46, p. 19, ¶72 and p. 20, ¶77. ERISA accomplishes these goals through the broad equitable relief provided by §502. Equitable relief includes, but is not limited to the reinstatement, payment of back and benefits and payment of front pay and benefits.

In the absence of reinstatement, back and front pay and benefits, as forms of equitable restitution, are available as a remedy in this case. Federal courts have long found payment of back pay and benefits as an appropriate form of equitable relief to remedy violations of federal employment law. *See generally Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 571, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292-93, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49, 57 S.Ct. 615, 81 L.Ed. 893 (1937); *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir. 1995) (applying ERISA § 502); and *Warner v. Buck Creek Nursery, Inc.*, 149 F.Supp.2d 246, 256-57 (W.D.Va., 2001) (applying ERISA § 502). An award of back pay and benefits is a form of restitution when it represents the disgorgement of profits that employers realize through illegal conduct. There is ample evidence in the present case that the Respondents engaged in prohibited conduct with the intent of realizing additional profits.

Front pay and benefits is a straightforward form of equitable relief when reinstatement is unavailable. In *Schwartz v. Gregori*, the court recognized:

> The question of front pay is more straightforward. In other contexts, this court has characterized front pay as an equitable remedy. E.g., Shore v. Federal Express Corp., 42 F.3d 373 (6th Cir. 1994) (front pay under Title VII, 42 U.S.C. § 2000e-5(g), authorizing "equitable relief"); Roush v. KFC Nat'l Management Co., 10 F.3d 392, 398 (6th Cir. 1993), cert. denied, 513 U.S. 808, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994) (action under Age Discrimination in Employment Act, 29 U.S.C. § 626(c)(1), authorizing legal or equitable relief; front pay characterized as equitable). Front pay is awarded only when the preferred remedy of reinstatement, indisputably an equitable remedy, is not appropriate or feasible.

Supra at 1023. Reinstatement may be a viable remedy for the Petitioners since their jobs were transferred to the Respondent's nearby alter ego facility on Mancini Drive. However, even in the absence of reinstatement, front pay and benefits is an appropriate remedy upon a finding of liability in this case and would be consistent with the nation's obligations to provide a remedy for violations of citizen's right to social security when the attainment of benefits is illegally interfered with by an employer.

For the remainder of their arguments on these issues, *amici* adopts by reference the arguments of the

Petitioners as stated on pp. 27 through 29 of pending *Petition for Writ of Certiorari.*

CONCLUSION

For the forgoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals, Sixth Circuit in this matter.

Respectfully submitted,

WILLIAM GOODMAN
GOODMAN & HURWITZ PC
1394 E Jefferson Ave
Detroit, MI 48207
(313) 567-6170
(Counsel of Record)

-and-

JOHN C. PHILO
MAURICE & JANE SUGAR LAW CENTER
FOR ECONOMIC & SOCIAL JUSTICE
4605 Cass Avenue
Detroit, MI 48201
(313) 993-4505